No. 2289

United States

Circuit Court of Appeals

For the Ninth Circuit.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Appellant,

vs.

AMERICAN BONDING COMPANY, OF BALTIMORE, MARYLAND, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

[Names and Addresses of Attorneys.]

M. BROWN, Esq., Solicitor for Defendant and Appellant,
Billings, Montana.

Messrs. WALSH, NOLAN & SCALLON, Solicitors for Complainant and Appellee.
Helena, Montana.

In the District Court of the United States in and for the District of Montana.

IN EQUITY—No. 236.

AMERICAN BONDING COMPANY, OF BALTIMORE, a Corporation,
Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Be it remembered that on the 25th day of March, 1912, the complainant filed its bill of complaint herein, which is entered of final record as follows, to wit: [1*]

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*Page-number appearing at foot of page of original certified Record.

In the District Court of the United States in and for the District of Montana, in Equity Sitting.

AMERICAN BONDING COMPANY, OF BALTIMORE, MARYLAND, a Corporation,
Complainant,

vs.

S. G. REYNOLDS, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Bill of Complaint.

To the Honorable Judge of the District Court of the United States, in and for the District of Montana:

The American Bonding Company of Baltimore, a corporation, brings this its Bill of Complaint against S. G. Reynolds, as receiver of the First Trust and Savings Bank of Billings, Montana, and alleges:

That the complainant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact business in the State of Montana, and having its principal place of business and residing at the city of Baltimore, in the said State of Maryland.

That the first Trust and Savings Bank of Billings, Montana, is, and at all times herein mentioned was, a banking corporation, organized and existing under and by virtue of the laws of the State of Montana, and having its principal place of business and residing at Billings, in said state.

That on the 14th day of June, 1910, the defendant S. G. Reynolds, who then was and still remains a resident and citizen of the State of Montana, was, by order duly made and given in an action wherein the State of Montana was plaintiff, and the said First Trust and Savings Bank of Billings, Montana, a corporation, was defendant, which said action was brought in the [2] District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, appointed receiver of all the property and effects of the said First Trust and Savings Bank of Billings, Montana.

That at the time of the institution of the said action and at the time of the appointment of the said receiver, the State of Montana was a creditor of said bank, and that it then had, and for a long time theretofore had had, a deposit in the said bank in the sum of Twenty-five Thousand Dollars, as complainant is informed and believes, and for the amount so on deposit the said bank was indebted to the said State of Montana.

That some time during the year 1908, the complainant, for a valuable consideration then paid to it, and at the request of the said First Trust and Savings Bank of Billings, Montana, executed and delivered to the said State of Montana its bond as surety for the said First Trust and Savings Bank of Billings, Montana, in the sum of Ten Thousand Dollars, wherein and whereby it understood, as such surety that the said First Trust and Savings Bank of Billings, Montana, would pay, upon demand, to the said State of Montana all sums deposited by it in or

with the said bank.

That prior to the said 14th day of June, 1910, the said First Trust and Savings Bank of Billings, Montana, became and thereafter remained insolvent, and on and prior to said date refused and had refused to pay and was unable to pay to the State of Montana any portion of the said sum of Twenty-five Thousand Dollars, or thereabouts, so on deposit with the said bank, as aforesaid, by the State of Montana.

That prior to the 15th day of December, 1910, such payments had been made upon the obligation due from the said bank to the State of Montana as that there remained due to the said [3] State of Montana from the said bank the sum of Ten Thousand Dollars, and that on said date the defendant herein, as receiver as aforesaid, issued his certificate to the said State of Montana, reciting the indebtedness of the said bank to the said State of Montana, a copy of which is hereto annexed, marked Exhibit "A," and by this reference made a part hereof.

That in view of the obligation of your orator to the said State of Montana, arising under its bond so executed as aforesaid, your orator paid to the said State of Montana, the said sum of Ten Thousand Dollars, whereupon it, the said State of Montana, by its State Treasurer and Attorney General, appearing as attorneys for it in the said cause so pending in the District Court of Yellowstone County, Montana, wherein the said State of Montana was plaintiff, and the said First Trust and Savings Bank of Billings, was defendant, assigned and transferred to your orator its said claim against the said bank

evidenced by the certificate aforesaid, and your orator is now the owner and holder of said claim and has succeeded and is subrogated to the rights of the State of Montana against the said bank.

That under the laws of the said State of Montana, the said state has, and at all times had, a preference right to be paid in full in preference to all other creditors of the said First Trust and Savings Bank, and that by virtue of the facts hereinbefore set forth your orator has a right to be paid the full amount of the said claim so evidenced by the said certificate in full, in preference to the claims of all other creditors.

That notwithstanding the premises, the said defendant S. G. Reynolds has refused and still refuses to pay in full the claim of your orator, or to pay the same at all, except as [4] dividends are declared, distributed and paid to the general creditors of the said bank, and then only in the same ratable proportion as all of the said general creditors are paid, and your orator further avers that it will be impossible to realize from the funds and property in the hands of the said defendant the full amount of all of the just claims against the said bank or any part thereof in excess of about sixty per cent, but your orator avers that the said defendant now has in his hands, as your orator is informed and believes, a sum sufficient to pay the claim of your orator in full.

That on the 9th day of December, 1911, by an order of the said District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, in which was pending the aforesaid cause in which the said S. G. Reynolds was

so appointed as the receiver of the said First Trust and Savings Bank of Billings, Montana, then duly made and given, the complainant herein was authorized to begin and prosecute an action against the said receiver for the relief herein prayed.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that it is adjudged that the complainant is entitled with preference right to be paid the amount of its claim, as [5] hereinbefore set forth, out of any funds which may come into the hands of the said receiver, and that the said defendant S. G. Reynolds, as receiver of the First Trust and Savings Bank be, by the Court, directed to pay to the complainant, out of any moneys in his hands, or which may come into his hands as receiver of the First Trust and Savings Bank of Billings, Montana, the sum of Ten Thousand Dollars, with interest thereon from the 14th day of June, 1910, and for such other and further relief as to the Court may seem just.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, directed to the said S. G. Reynolds, commanding

him on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

WALSH & NOLAN,
Solicitors for Complainant. [6]

United States of America,
District of Montana,—ss.

T. J. Walsh, being duly sworn, deposes and says that he is one of the solicitors for the above-named complainant, and makes this verification for and in its behalf; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

Affiant further says that he makes this verification for the reason that none of the officers of the complainant corporation are or reside in the county of Lewis and Clark, State and District of Montana, wherein affiant is and resides.

T. J. WALSH.

Subscribed and sworn to before me this 19th day of March, 1912.

[Seal] J. R. WINE, Jr.,
Notary Public for the State of Montana, Residing at Helena.

My commission expires Nov. 13, 1914. [7]

Exhibit A [to Complaint].

RECEIVER'S CERTIFICATE OF PROOF OF CLAIM.

#868. Receiver's Office,
Billings, Montana, Dec. 15, 1910.

This is to certify, that Elmer E. Esselstyn, as Treasurer of the State of Montana, has this day made legal and satisfactory proof that he is a general creditor of The First Trust and Savings Bank of Billings, Mont., to the amount of Ten Thousand ($10,000.00) Dollars, and ..... cents, upon the following claim, to wit:

	Dollars.	Cents.
First Mortgage Bonds.....		
Time Certificate of Deposit No. ..... issued by the First Trust and Savings Bank of Billings, Billings, Mont.		
Unpaid Draft No.		
Protest Fees on Draft No.....		
Savings Account No. 1002, The First Trust and Savings Bank of Billings, Billings, Mont.....	10,000	00
Interest on Time Certificate of Deposit No.		
Unpaid Cashier's Check No.....		
Total.....	10,000	00

and he, or the lawful assignee of this claim, will be alone entitled to the dividends thereon.

NO ASSIGNMENT OF THIS CLAIM, or any portion thereof, will be recognized in the payments

of dividends, unless notice of such assignment is given to the Receiver and entered upon his books before such dividends are declared, as evidenced by his endorsement hereon. This certificate is to be surrendered to the Receiver upon the payment of the final dividend.

S. G. REYNOLDS,
Receiver of the First Trust & Savings Bank of Billings, Billings, Montana. [8]

Billings, Montana, Dec. 15, 1910.

For value received I hereby assign the within claim to the American Bonding Company of Baltimore, Maryland.

ELMER E. ESSELSTYN,
State Treasurer.
By ALBERT J. GALEN,
Attorney General for Montana.

Witness:
S. G. REYNOLDS.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed Mar. 25, 1912. Geo. W. Sproule, Clerk. [9]

And thereafter, on March 25, 1912, a subpoena in equity was duly issued herein, which is entered of final record as follows, to wit: [10]

[Subpoena.]

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To S. G. Reynolds, as Receiver of the First Trust and Savings Bank of Billings, Montana.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 6th day of May, A. D. 1912, to answer a Bill of Complaint exhibited against you in said court by American Bonding Company of Baltimore, Maryland, a corporation, complainant, who is a citizen of the State of Maryland, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 25th day of March, in the year of our Lord one thousand nine

hundred and twelve and of our Independence the 136.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above suit, on or before the first Monday of May next, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

WALSH & NOLAN,
Solicitors for Complainant, Helena, Montana. [11]

Due service of the foregoing subpoena by S. G. Reynolds, as receiver of the First Trust and Savings Bank of Billings, Montana.

Dated Apl. 4, 1912.

S. G. REYNOLDS,
By HATHHORN & BROWN,
His Attorneys.

Filed Apl. 17, 1912. Geo. W. Sproule, Clerk. [12]

And thereafter, on May 4, 1912, the answer of defendant was filed herein, which is entered of final record as follows, to wit: [13]

UNITED STATES OF AMERICA.

In the District Court of the United States in and for the District of Montana.

IN EQUITY SITTING.

AMERICAN BONDING COMPANY, OF BALTIMORE, MARYLAND, a Corporation,
Complainant,

vs.

S. G. REYNOLDS, Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Answer.

To the Honorable Judge of the District Court of the United States for the District of Montana:

The answer of S. G. Reynolds, Receiver of the First Trust and Savings Bank of Billings, Montana, defendant, to the Bill of Complaint of the American Bonding Company of Baltimore, Maryland, a corporation, complainant.

This defendant now, and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said Bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer thereto, answering saith:

That he admits that the complainant, the American Bonding Company of Baltimore, Maryland, is and at all times mentioned in said Bill was, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact business in the State of Montana, and having its principal place of business and residing at [14] the city of Baltimore, and said State of Maryland, as alleged in complainant's Bill of Complaint.

Further answering this defendant says that he admits that the First Trust and Savings Bank of Billings, Montana, is, and at all times herein mentioned was, a banking corporation organized and existing under and by virtue of the laws of the State of Montana, and having its principal place of business and residing at Billings, in said State of Montana, as alleged in said Bill.

Further answering said Bill of Complaint this defendant admits that on the 14th day of June, 1910, this defendant, who then was and still remains a resident and citizen of the State of Montana, was by order duly made and given in an action wherein the State of Montana was plaintiff, and the said First Trust and Savings Bank of Billings, Montana, a corporation was defendant, which said action was brought in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, appointed Receiver of all the property and effects of the said First Trust and Savings Bank of Billings, Montana, as in said complaint alleged.

Further answering said Bill of Complaint this de-

fendant admits that at the time of the institution of this action, and at the time of the appointment of said defendant as Receiver, the State of Montana was a creditor of said bank, and that it then had, and for a long time theretofore had, a deposit in the said bank in the sum of Twenty-five Thousand ($25,000) Dollars, as alleged in said Bill of Complaint, and for the amount so on deposit the said bank was indebted to the said State of Montana. [15]

Further answering said Bill of Complaint this defendant admits that some time during the year 1908 the complainant, for a valuable consideration then paid to it, and at the request of the said First Trust and Savings Bank of Billings, Montana, executed and delivered to the said State of Montana, its bond as surety for the said First Trust and Savings Bank of Billings, Montana, in the sum of Ten Thousand ($10,000) Dollars, wherein and whereby it undertook as such surety that the said First Trust and Savings Bank of Billings, Montana, would pay upon demand to the said State of Montana, all sums deposited by it in or with said bank; that prior to the said 14th day of June, 1910, the said First Trust and Savings Bank of Billings, Montana, became and thereafter remained insolvent, and on and prior to said date refused and was unable to pay to the State of Montana, any portion of the sum that it owed said State at said time, but denies that at the time the said First Trust and Savings Bank of Billings, Montana, became and remained insolvent as aforesaid, that it owed the said State of Montana the said sum of Twenty-five Thousand ($25,000) Dollars or there-

abouts, but it is admitted that at said time it owed the said State of Montana the sum of Ten Thousand ($10,000) Dollars, and avers that before the said 15th day of December, 1910, the said State of Montana had drawn out of said First Trust and Savings Bank all the moneys that it had deposited therein except the sum of Ten Thousand ($10,000) Dollars, and said defendant admits that on said last mentioned date said defendant, as Receiver as aforesaid, issued his certificate to the said State of Montana, reciting the indebtedness of said bank to the said State of Montana, and this defendant admits that the copy of said certificate annexed to the Bill of Complaint in this cause, is a true copy thereof. [16]

Further answering the said Bill of Complaint this defendant says that he is informed and believes, and upon such information and belief, admits that the said defendant has paid to said State of Montana the said sum of Ten Thousand ($10,000) Dollars pursuant to said bond given to the said State of Montana, as alleged in said Bill of Complaint; and this defendant admits that upon such payment the said State of Montana assigned and transferred to said complainant its said claim against said bank as evidenced by the certificate aforesaid, and that the said complainant is now the owner and holder of said claim, and has succeeded to the rights of the State of Montana against said bank, as alleged in said Bill of Complaint.

Further answering said Bill of Complaint this defendant denies that under the laws of the State of Montana, the said State has, and at all times had, a

preference right to be paid in full in preference to other creditors of said First Trust and Savings Bank of Billings, Montana, and that by virtue of the facts alleged in said Bill of Complaint or otherwise the said complainant has a right to be paid the full amount of said claim so evidenced by said certificate in preference to the claims of all other creditors, as alleged in said Bill of Complaint.

Further answering the said Bill of Complaint this defendant says that he admits that he has refused and still refuses to pay in full the claim of the complainant, but alleges that he has paid the said complainant a dividend upon said indebtedness of twenty per cent, and that he is ready and willing as fast as he is able to make dividends from the proceeds belonging to said First Trust and Savings Bank of which he is receiver as aforesaid, to continue to pay dividends upon said [17] sum of Ten Thousand ($10,000) Dollars, but he avers that it is doubtful whether he will be able to pay the sum of Sixty (60) per cent upon said claim of said complainant, or even that amount.

Further answering said Bill of Complaint this defendant says that he admits that he has a sufficient amount of money in his hands to pay the entire claim of said complainant, but that if he does so it will be to the detriment of all of the other creditors of said First Trust and Savings Bank, of which he is receiver.

Further answering said Bill of Complaint this defendant admits that said complainant was authorized to begin to prosecute an action against said receiver

for the relief herein prayed, as alleged in said complainant's bill of complaint.

And this defendant denies that there is any other matter, cause or thing in said complainant's said Bill of Complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to the knowledge and belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

S. G. REYNOLDS,
Defendant.

HATHHORN & BROWN,
Solicitors for Defendant.

Filed May 4, 1912. Geo. W. Sproule, Clerk **[18]**

Thereafter an order substituting party defendant was made herein, as follows, to wit:

[Order of Submission and of Substitution of Party Defendant.]

In the District Court of the United States, in and for the District of Montana.

No. 236.

AMERICAN BONDING CO.

vs.

S. G. REYNOLDS, Receiver.

This cause came on regularly for hearing at this time upon the Bill and Answer in said cause, T. J. Walsh, Esq., appearing on behalf of the complainant, and M. Brown, Esq., on behalf of the defendant, and, after argument of counsel, cause submitted. By consent of counsel A. H. Brown substituted for S. G. Reynolds as defendant and receiver herein.

Entered in open court, February 6th, 1913.

GEO. W. SPROULE,
Clerk. [19]

And thereafter, on March 25, 1913, Decree was entered herein, which said decree is entered of final record as follows, to wit:

In the District Court of the United States in and for the District of Montana.

AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Complainant,

vs.

A. H. BROWN, Substituted for S. G. REYNOLDS, as Defendant and as Receiver of the First Trust and Savings Bank of Billings, Montana, Defendant.

Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the complainant is entitled to recover from the First Trust and Savings Bank of Billings, Montana, and from the substituted defendant, A. H. Brown, as receiver of said First Trust and Savings Bank of Billings, Montana, the sum of Ten Thousand Dollars ($10,000.00), with interest thereon at the rate of eight per cent per annum from the 14th day of June, 1910, amounting in all to the sum of Twelve Thousand Two Hundred Twenty-two 20/100 Dollars.

It is further ordered, adjudged and decreed that the complainant is entitled to be paid in preference to all other creditors the said amount, together with accruing interest thereon.

And it is further ordered, adjudged and decreed that the said A. H. Brown, as receiver of said bank, be, and he hereby is ordered to pay to the said complainant, out of any moneys in [20] his hands or which may come into his hands as such receiver of said First Trust and Savings Bank of Billings, Montana, in preference to all other creditors, the said sum of Twelve Thousand Two Hundred Twenty-two 20/100 Dollars, with interest thereon from this date

at the rate of eight per cent per annum until paid.

It is further ordered, adjudged and decreed that complainant do have and recover of and from the defendant receiver, its costs herein incurred, amounting to the sum of forty-five and 20/100 dollars.

Dated this 25th day of March, 1913.

By the Court.

GEORGE M. BOURQUIN,
Judge.

Filed and entered March 25, 1913. Geo. W. Sproule, Clerk. [21]

[Clerk's Certificate to Judgment-roll.]

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this Court.

Witness my hand and the seal of said Court this 25th day of March, 1913.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy.

[Indorsed]: Final Record, etc. Filed Mar. 25, 1913. Geo. W. Sproule, Clerk. [22]

That on February 11, 1913, the Court's decision was filed herein, being as follows, to wit:

In the District Court of the United States, District of Montana.

No. 236—IN EQUITY.

AMERICAN BONDING CO.,

Plaintiff,

vs.

S. G. REYNOLDS, Receiver,

Defendant.

Court's Decision.

Complainant seeks to recover a debt due the State of Montana from an insolvent bank of which defendant is receiver by virtue of appointment by a competent court on petition by said State by statutory authority, the debt being for public funds deposited in said bank by the State treasurer, for which complainant was surety, all by statutory authority, and which debt it paid. The funds of said bank are insufficient to pay all creditors. Complainant contends that public debts are entitled to priority in that the State having adopted the common law of England succeeds to or is vested with a like prerogative of the Crown.

Defendant contends that (1) the State has no such priority; (2) if it has it can not be asserted after the debtor's property has passed to a receiver.

This prerogative of the Crown or King of England is one of many attributes of sovereignty wherever it resides. The King, being the repository of the

sovereign power and authority, the supreme executive power and duty is vested with these prerogatives. They consist of certain rights, powers and privileges essential to the dignity of royalty or necessary to the general welfare of the entire community, and which are denied to individuals. The first are direct, the second incidental. They are dictated by [23] expediency, necessity and public policy. That here involved and like, are justified in that where the rights and interests of all the people meet those of one of them, the former is of more importance and must prevail.

The Crown's priority over subjects in payment of debts is to secure and conserve the revenues—the life-blood of the State, that the latter may be maintained in peace and war and its obligations discharged. It is of the incidental prerogatives and belongs to the King, not as an individual but *parens patriae,* or as universal trustee for the people. It is in fact a reservation or exception to the general course of law, in favor of the public or for its good. From its nature, its origin may be said to be higher than, superior to, and to antedate the common law,—of the fundamentals of all government. Its existence is suggested in Magna Charta, Coke notes that Littleton twice refers to it as the Law, Blackstone says it is out of the course of the common law, and while as a principle it enters into the British constitution, in Halsbury's Laws of England it is said that it is created and limited by the common law. But whether it is of those prerogatives that necessarily enter into the political being of every State and

so as much into ours as into that of England, or is of and created by the common law, it would seem to be of the law of Montana. The statutes of the latter provide that where they declare the law there is no common law. Otherwise, if not repugnant to, inconsistent or in conflict with the constitution or statutes of the State or United States and if of a general nature and applicable, the common law of England is and shall be the law and rule of decision.

Montana, R. S., secs. 3552, 8060. [24]

And so has been the law in Montana for more than forty years. There is no statute in this State relating to the priority of public debts. The rule of the common law in respect thereto is not objectionable in any of the particulars aforesaid. That it is of a general nature and applicable to the States's institutions cannot be gainsaid. That it is of general benefit and value, is evidenced by the fact that the United States and some of the States have established it by statute, but it is not clear the fundamental law of States is not so in the beginning and apart from statute. These statutes may be taken as approval of the principle of priority of public debts, as evidence of the rule's applicability, and as largely declaratory of inherent or common law. Since this prerogative of the Crown attaches to sovereign power wherever it resides (See Bank vs. U. S., 19 Wall. 239, U. S. vs. Hoar, Fed. Case 15,359), it must attach to Montana, a sovereign State.

U. S. vs. Bank of North Carolina, 6 Peters, 35, is not opposed to this conclusion. In that case there was involved a public debt of a particular class with

which Congress had dealt presumably with intent to establish a complete system in respect thereto. Under such circumstances the statute furnishes the only rule.

See Bank vs. U. S., 107 U. S. 448.

It may be noted that the opinion of the Court in U. S. vs. Bank of North Carolina, *supra,* was delivered by Justice Story, who earlier on circuit decided U. S. vs. Hoar, Fed. Case 15,373, and therein gave full recognition to like prerogatives as inherent in the Crown and States, needing no statute to establish or effectuate them.

Be it as it may, however, I am persuaded there is no escape in reason from the conclusion that by adopting the [25] common law, Montana adopted the prerogative rule of priority of public debts.

That the law may not have been heretofore invoked is not considered important. Many laws, statutory as well as common, are quiescent for years, but are not thereby repealed or abrogated. No occasion to appeal to them may have arisen. The weight of authority and what seems to be the better reason is followed here.

Cases thereon may be found collated at 18 Cyc. 550, 36 Cyc. 871, 29 L. R. A. (N. S.) 226, 1 L. R. A. (N. S.) 255.

See Carnegie Trust Co. case, 136 N. Y. S. 466.

Trust Co. vs. Ry. Co., 186 Fed. 291.

To contend that this valuable and necessary prerogative or right is arbitrary and discretionary and that none can complain if the State refuses to exercise it, is to contend it is discretionary with the

State's officers to enforce the law, discharge their duty, and conserve the revenues and interests of the people. If true where no one has a special interest therein, it is not true in respect to a surety who pays the State's debt and succeeds to the State's right or is entitled to subrogation.

This law of priority is not that of the ancient common law with all its rigorous methods of enforcement, but is that of the modified common law as it was when adopted by Montana. The right thereof can be exercised so long as the debtor's title to the property out of which it is sought to make the public debt, is not divested. And this is true whether the property is levied upon and seized in the debtor's possession, or is in *custodia legis* when the priority is asserted.

See Middlesex Freeholders' Case, 29 N. J. Eq. 268.

At common law even though another creditor has procured [26] levy and seizure of the goods of the King's debtor, at any time before sale under the writ the King's prerogative or priority prevails if asserted.

Although the bank here involved is in the hands of a receiver appointed on the State's petition, its title to its property has not been divested. While the receiver is statutory to the extent that he is appointed by virtue of statutory authority under circumstances not of themselves warranting the appointment by a court of chancery, yet he has no greater or other rights and powers than those of a chancery receiver for the statute creates none.

A court of chancery's receiver does not take title to the property involved but only possession as an officer of the court and to dispose thereof as the Court directs. The statute by virtue of which this defendant was appointed does not necessarily contemplate a winding up of the affairs of the bank. It is not dissolved and may resume.

The State has not waived its priority. The statute made it the duty of the State to petition for a receiver for the protection of all interested parties. Therein is nothing annulling the law of priority of public debts, and the discharge of this statutory duty is not inconsistent therewith.

When a court of chancery takes possession of property by its receiver, it is familiar law the owner's title is not divested, and in administration thereof the law of priorities and preferences govern in the payment of debts. Nor would the fact that the State received security from the bank seem to affect priority.

It is but a precautionary measure of value to the State, and injuring no one, the security to be primarily resorted to if the State pleaseth or for the State's protection if in the [27] exercise of its priority the bank's assets are insufficient to satisfy the State's debt.

If another for reasonable cause pays the debtor's debt to the King, at common law he succeeded to the King's priority. Formerly a creditor of the King's debtor could not sue him without first satisfying the King's debt, but having satisfied it, he succeeded to

the King's rights in respect thereto. And so is it by subrogation.

Complainant, surety for the bank, necessarily paid the latter's debt to the State and so succeeds to the State's right. It is entitled to recover here, and decree accordingly.

Feb. 11, 1913.

GEO. M. BOURQUIN.
Judge.

Filed Feb. 11, 1913. Geo. W. Sproule, Clerk.

[28]

And thereafter, on June 12, 1913, assignment of errors was filed herein, being as follows, to wit:

UNITED STATES OF AMERICA.

In the District Court of the United States for the District of Montana.

AMERICAN BONDING COMPANY,
Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Assignment of Errors.

Now, on this 11th day of June, A. D. 1913, comes the defendant by his solicitors, Hathhorn & Brown, and says that the decree entered in the above cause on the 25th day of March, 1913, is erroneous and unjust to the defendant,

First: Because the Court erred in holding and deciding that the State of Montana was a preferred creditor of the defendant as receiver of the First Trust & Savings Bank of Billings, Montana, before it assigned its claim against the First Trust & Savings Bank of Billings, Montana, to said complainant;

Second: Because the Court erred in holding and deciding that the complainant, as assignee of the State of Montana, is a preferred creditor of said defendant as receiver as aforesaid, and entitled to recover in this cause the amount of money paid to said State by it, as alleged in the Bill of Complaint in this cause, and admitted in the answer;

Third: Because the Court erred in holding and deciding that said complainant is a preferred creditor of the said First Trust & Savings Bank of Billings, Montana, and entitled to recover from the defendant in this cause, as receiver, the sum paid by it to the State of Montana, as alleged in the [29] Bill of Complaint in this cause and admitted in the answer.

M. BROWN,
HATHHORN & BROWN,
Solicitors for Defendant.

Filed June 12, 1913. Geo. W. Sproule, Clerk. [30]

And thereafter on June 12, 1913, petition for appeal and order allowing same were duly filed herein, being as follows, to wit:

[Petition for Appeal.]

UNITED STATES OF AMERICA.

In the District Court of the United States for the District of Montana.

IN EQUITY.

AMERICAN BONDING COMPANY,
Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

PETITION FOR APPEAL FILED JUNE ——, A. D. 1913, IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA.

To the Honorable GEORGE M. BOURQUIN, District Judge of the District of Montana:

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause on the 25th day of March, A. D. 1913, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and

papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California; and desiring to supersede the execution of the decree, petitioner here tenders a bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

M. BROWN,
HATHHORN & BROWN,
Solicitors for Defendant. [31]

[Order Allowing Appeal, etc.]

United States District Court, District of Montana.

AMERICAN BONDING COMPANY,
Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust & Savings Bank of Billings, Montana.
Defendant.

PETITION GRANTED AND APPEAL ALLOWED.

The petition hereto annexed is granted, and the appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of Fifteen Thousand ($15,000) Dollars, with sufficient sureties to be conditioned as required by law.

June 11th, 1913.

GEORGE M. BOURQUIN,
Judge of the United States District Court, for the District of Montana.

Filed June 12, 1913. Geo. W. Sproule, Clerk.
[32]

Thereafter, on June 12, 1913, a stipulation was filed herein, being as follows, to wit:

In the District Court of the United States, in and for the District of Montana.

AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Complainant,

vs.

A. H. BROWN, Substituted for S. G. REYNOLDS, as Defendant and as Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Stipulation [Fixing Amount of Supersedeas Bond on Appeal].

It is hereby stipulated by and between the parties hereto, through their counsel, that the supersedeas bond on appeal in this case may, and shall be, deemed duly fixed at the sum of fifteen thousand dollars ($15,000.00), and that that sum will be deemed sufficient for the purpose of the bond.

Dated this 21st day of March, 1913.

WALSH, NOLAN & SCALLON,
Solicitors for Complainant.
HATHHORN & BROWN,
Solicitors for Defendant.

Filed June 12, 1913. Geo. W. Sproule, Clerk.
[33]

Thereafter, on July 12, 1913, Bond on Appeal was duly approved and filed herein, being as follows, to wit:

In the District Court of the United States for the District of Montana.

THE AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,
Complainant,

vs.

ARTHUR H. BROWN, Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Bond [on Appeal].

KNOW ALL MEN BY THESE PRESENTS, that we, Arthur H. Brown, as Receiver of the First Trust and Savings Bank of Billings, Montana, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to do business in the State of Montana, as surety, are held and firmly bound unto the above-named complainant, American Bonding Company of Baltimore, Maryland, in the full and just sum of Fifteen Thousand ($15,000) Dollars, to be paid to the said American Bonding Company of Baltimore, Maryland, its attorneys, solicitors, successors or assigns, for which payment well and truly to be made we bind ourselves, our successors jointly and severally firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that

WHEREAS, the said Arthur H. Brown, as Receiver having taken an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the final decree rendered and entered in the above entitled action on the 25th day of March, 1913.

NOW, THEREFORE, the condition of the above obligation is such that if the above-named defendant, Arthur H. Brown, as [34] Receiver of the First Trust and Savings Bank of Billings, Montana, shall prosecute said appeal and shall answer all damages and costs that may be awarded against him, if he fails to make good his said appeal, then the above obligation is to be void; otherwise to be and remain in full force and virtue.

Sealed with our seals and dated this 1st day of May, in the year of our Lord, 1913.

ARTHUR H. BROWN, [Sea]
As Receiver of First Trust & Savings Bank of Billings.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By CLINTON O. PRICE,
Attorney in Fact.

[Corporate Seal]

[Indorsed]: No. 236. American Bonding Co. vs. A. H. Brown, Receiver. Bond. 7–12–13. Approved: Bourquin, J. Filed July 12, 1913. Geo. W. Sproule, Clerk. [35]

That on the 9th day of July, 1913, Citation was duly issued herein, which Citation is hereto attached and is in the words and figures following, to wit: [36]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA.

To American Bonding Company of Baltimore, Maryland, Plaintiff, and to Walsh, Nolan & Scallon, Attorneys for Plaintiff, Greeting:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court, in and for the District of Montana, wherein American Bonding Company of Baltimore, Maryland, is complainant, and Arthur H. Brown, as Receiver of the First Trust and Savings Bank of Billings, Montana, defendant, an appeal has been allowed the defendant therein to the United States Circuit Court of Appeals, for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court, at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this 9th day of July, A. D. 1913.

GEO. M. BOURQUIN,
District Judge.

Due and personal service of the foregoing citation is hereby accepted this 9th day of July, 1913.

WALSH, NOLAN & SCALLON,
Attorneys for Complainant, American Bonding Company of Baltimore, Maryland. [37]

[Endorsed]: No. 236. United States District Court, District of Montana. American Bonding Co., Complainant, vs. A. H. Brown, as Receiver. Citation. Filed July 9, 1913. Geo. W. Sproule, Clerk. [38]

And thereafter, on July 9, 1913, a praecipe for transcript on appeal was filed herein, being as follows, to wit: [39]

In the District Court of the United States, District of Montana.

No. 236.

AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND,
Complainant,

vs.

A. H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Defendant.

Praecipe [for Transcript of Record].

The Clerk of said Court will please certify to the United States Circuit Court of Appeals for the Ninth Circuit, whatever papers are necessary in this cause to make the appeal to said Appellate Court perfect, to wit: Bill of Complaint, Subpoena in Equity, An-

swer, Decree, Court's Decision, Assignment of Errors, Petition for Appeal and Order, Bond on Appeal, Citation and Praecipe, and Stipulation as to bond.

LOUD, COLLINS, BROWN, CAMPBELL & WOOD,

By MICHAEL BROWN,
Attorney for Defendant.

Dated July 9th, 1913.

Filed July 9, 1913. Geo. W. Sproule, Clerk. [40]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 41 pages, numbered consecutively from 1 to 41, inclusive, is a true and correct transcript of the pleadings, process, orders and decree, decision of the Court and all other proceedings had in said cause, specified in the praecipe for transcript filed herein, as appears from the original files and records of said court in my possession as such clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Four 50/100 Dollars, and that same have been paid by appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 22d day of July, 1913.

[Seal] GEO. W. SPROULE,
Clerk. [41]

[Endorsed]: No. 2289. United States Circuit Court of Appeals for the Ninth Circuit. Arthur H. Brown, as Receiver of the First Trust and Savings Bank of Billings, Montana, Appellant, vs. American Bonding Company of Baltimore, Maryland, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed July 26, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,
Appellant,

vs.

AMERICAN BONDING COMPANY, OF BALTIMORE, MARYLAND, a Corporation,
Appellee.

Brief of Appellant.

STATEMENT OF CASE.

The American Bonding Company, of Baltimore, Maryland, appellee, is a Maryland corporation with its principal place of business at the City of Baltimore, and is authorized to transact business in the State of Montana. In the year 1908 the said Bonding Company for a valuable consideration

then paid to it by the First Trust & Savings Bank of Billings, Montana, executed and delivered to the State of Montana as surety for the said Bank, a bond wherein and whereby it undertook as such surety that the said Bank would pay upon demand to the State of Montana all sums of money deposited by the State in or with the said Bank.

The said First Trust & Savings Bank of Billings, Montana, at the date of the execution and delivery of the said bond, was a state banking corporation organized and then existing under and by virtue of the laws of the State of Montana, conducting a banking business at Billings, Montana.

Prior to the 14th day of June, 1910, the said Bank became and thereafter remained insolvent. Upon the 14th day of June, 1910, under and pursuant to the provisions of Chapter 141, Laws of Montana, 1909, in an action in the District Court of the 13th Judicial District of the State of Montana, in and for the County of Yellowstone, wherein the State of Montana was the Plaintiff and the said First Trust & Savings Bank of Billings, Montana, was Defendant, one S. G. Reynolds, was by an Order of said Court, appointed Receiver of all the property and effects of the said Bank to wind up its affairs. At the time of the institution of the said action and the appointment of said Receiver, the State of Montana was a creditor of said Bank by virtue of deposits theretofore made in said Bank by the State Treasurer of Montana pursuant to the

provisions of Section 183, Revised Codes of Montana, 1907. Prior to the 15th day of December, 1910, the Treasurer of the State of Montana drew out of said Bank all the moneys deposited therein except the sum of Ten Thousand Dollars; and on said 15th day of December, 1910, the Receiver, appointed as aforesaid, issued to the said Treasurer of the State of Montana a certificate reciting the indebtedness of the said Bank and that the said Treasurer of the State of Montana had made legal and satisfactory proof that he is a general creditor of said Bank to the amount of Ten Thousand Dollars ($10,000) and that he or the lawful assignee of the claim would be entitled to the dividends thereon. (Record p. 8.) Thereafter the Bonding Company as surety, paid to the State of Montana the sum of Ten Thousand Dollars, whereupon the certificate of the Receiver as aforesaid was assigned to the said Bonding Company, the assignment having been executed in the name of the State Treasurer by the Attorney General for Montana. (Record p. 9.)

This is a suit in equity by the Bonding Company as Complainant, against the said Receiver as Defendant, to have said Bonding Company subrogated to a claimed right of the State of Montana to be paid in full in preference to all other creditors of said Bank. The funds and property in the hands of the Receiver are insufficient to pay the full amount of all claims against the said bank in excess of about sixty (60) per cent thereof. The

Receiver has in his hands a sum sufficient to pay the claim of the said Bonding Company in full but has refused and still refuses to pay the claim except as dividends are declared, distributed and paid to the general creditors of the bank, and then only in the same ratable proportion as all of the said general creditors are paid.

February 6, 1913, by consent of A. H. Brown, the successor of Reynolds as receiver, was by an Order of Court substituted for Reynolds as Defendant in the said suit.

The U. S. District Court for Montana decided that the State had a preferential right of payment and that appellee is entitled to enforce such right, and on March 25, 1913 a Decree for Complainant was entered, from which the Receiver has appealed to this Court.

The question for decision is whether the claim of appellee is a prior claim and should be paid before any other creditors of said Bank are paid.

SPECIFICATION OF ERROR.

1. The Court erred in holding and deciding that the Apellee is entitled to be paid the sum of Ten Thousand Dollars, together with accrued interest thereon, in preference to all other creditors of said Bank.

BRIEF AND ARGUMENT.

1. The Common Law Prerogative of the King to Preference in the Payment of His Debts Is Not a Rule of Decision Applicable to the State of Montana As a Sovereign Power Since Neither the Constitution Nor Statutes of Montana Confer the Prerogative Upon the State.

The District Court in its decision (Record, pages 22-23) has decided that under the common law of England the Crown possessed a prerogative as parens patriae to priority over its subjects in the payment of debts and that this rule of the common law is the law and rule of decision in Montana by virtue of the following sections of the Revised Codes of Montana, 1907, to-wit:

"Section 3552. Common Law, When Rule of Decision.—The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or Laws of this state, or of the Codes, is the rule of decision in all the Courts of this state."

"Section 8060. No Common Law in This State. —In this state there is no common law in any case where the law is declared by the code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the Code or other statutes, the common law shall be the law and rule of decision."

This conclusion of the District Court is further

predicated upon the fact that there is no statute in the State of Montana relating to the priority of public debts.

The laws of the State of Montana and of the State of Michigan in this respect are the same.

Zimmerman, Commissioner of Banking vs. Chelsea Savings Bank et al (Mich.), 125 N. W. Rep. 424, (Decided March 19, 1910).

In the case cited the Court says:

"Neither in the constitution nor in the statutes of the state is the right of the state to a preference and priority over other creditors distinctly asserted. If the right exists it is as a prerogative of sovereignty. Successive constitutions of the state have declared, generally, that the common law shall remain in force, and it is not doubted that by the common law of England it was a prerogative right of the sovereign, with some exceptions and limitations, to have debts due to him paid ahead of debts due to his subjects."

In the Michigan case, supra, the Defendant bank became insolvent and was closed by the State Banking Commissioner pursuant to the statutes of the state. Thereupon a receiver was appointed. The American Surety Co. of New York, as Surety, and the Defendant, as Principal, had, prior to the institution of the action, entered into a bond to the Treasurer of the State of Michigan to secure the payment to the said state of all moneys belonging to it and deposited with the Chelsea Savings

Bank. After the Defendant bank became insolvent, the surety company, upon demand of the state, paid the face of its bond with interest, and thereupon intervened in the proceedings instituted by the state to liquidate the assets of the Chelsea Savings Bank, praying that the Receiver of the said bank be required to pay to intervener the sum so paid by it to the State of Michigan. The prayer of the intervener was denied by the Supreme Court of Michigan in the decision reported as above, and upon a rehearing of the said case (127 N. W. Rep. 351) the Supreme Court affirms its former decision and bases its conclusion upon the fact that "a royal prerogative is an arbitrary power vested in the executive, a power or will which is discretionary and uncontrolled;" and that since the State of Michigan had not exercised any prerogative right to priority of payment out of the assets of the insolvent bank "it is clear that no one may complain because the sovereign has not exercised a discretionary and arbitrary right." But the Supreme Court of Michigan also announces on the rehearing of the case a further doctrine as a basis for its conclusion, to-wit:

"We do not doubt that the state may provide by legislation for preference of payment of demands due to the state. The legislatures of some of the states and the Congress of the United States have to some extent given a preference to demands due to the Government. The right to do this is in-

herent in the state. It is exercised in this state, in a limited way, in the collection of the revenues. It has at all times been, as it now is, within the power of the legislature to make such provisions for state priority as seemed to be expedient. It has made none for cases like the one at bar. The form of our Government, the undoubted power of the Legislature in this behalf, furnish reasons for saying that in adopting the applicable rules of the common law as a part of the law of the state, the people did not adopt and thereby assert an arbitrary prerogative right to priority of payment of its debts, which was recognized by the common law."

Under the authority of the Michigan case, supra, we contend that the common law rule conferring upon the sovereign a prerogative right to preference in payment of debts due the Crown is not a rule of decision in Montana, as neither the constitution nor the statutes of the state provide for any such preference.

Again, in the Michigan case, supra, (125 N. W. Rep. 429), the Court says:

"The funds of the bank, the possession of which is taken under this act by an officer of the state, are required to be paid as collected to the State Treasurer. There is no provision for retaining out of such funds moneys due to the state, excluding other creditors of such a bank. On the contrary, ratable dividends are to be made from time to time on all such claims as may have been proved."

This is the law in Montana. The assets in the hands of the Receiver are to be divided pari passu among all creditors before the Court. Since the statute makes no distinction between creditors, the State of Montana as a creditor, or the Complainant here, if subrogated to its rights, must submit to the maxim that Equality is Equity.

The Courts of South Carolina and of Mississippi have both announced the rule in those jurisdictions to be that in the absence of constitutional or statutory enactments the state is entitled to no preferential right of payment out of the assets of an insolvent.

The State vs. J. M. Harris (So. Car.), 2 Bailey's Rep. 598;

Klinck, Administrator, vs. Keckley, Executor, (So. Car.) 2 Hill's Ch. 256;

Potter et al vs. Fidelity & Deposit Company of Maryland (Miss.) 58 So. 713.

In the case of State vs. Harris, supra, the Court says:

"The Sheriff is insolvent and it is contended that the state is entitled to be preferred to the other judgment creditors. The preference is claimed on the ground that in England it is a branch of the King's prerogative; but it is one, which I rejoice to have it in my power to say, has not been extended to the state. * * * If, however, it were a common law prerogative of the Crown, it does not follow that it has been transferred to the state. It can-

not be that the incidents of royalty are to adhere to the vestal of republicanism, when she has trod the diadem of kings under her feet and broken the sceptre of power. Monarchy is strictly a government for the benefit of the king. A republic on the other hand is a governmenet for the protection of the citizen against the exercise of all unjust power. It is a government administrated by a few as the representatives of the people and for their benefit. With this as the cardinal object of the state government, it has no privileges but such as are conferred upon it by the constitution, by act of the legislature, or such as are necessary for the due administration of the government. I am free to confess that I should be little disposed to extend the exclusive privileges of the state as between her and her citizens. A strict construction of power and a strict limitation of its exercise are perhaps the best safeguards of the governed against the governors. That the state may by direct legislation give herself the preference claimed, is not denied, and the answer to the present application is that she has not given it."

And again in Klinck vs. Keckley, supra, the Court says:

"The case of Commissioners of Public Accounts vs. Greenwood, 1 Eq. Rep. 450 (Decided in 1795 and never questioned) denied the general common law prerogative right of the king to be paid in preference to his subjects to have any application to the

state. In the State vs. Harris, 2 Bailey's Rep. 598, the same position was ruled. So that the right of the state to be paid in preference to other creditors depends now altogether on the statute law."

The Mississippi case, supra, was an action by the Fidelity & Deposit Company of Maryland against the receiver of an insolvent bank and in deciding the case the Court said:

"The whole question in this case is upon the right of the appellee to be subrogated to an alleged priority which it claims that the state has in the assets of the bank over the general creditors.

"The contention is that the state's debt constituted a trust fund and because the appellee company paid the state's claim it has the right to be subrogated to the state's right. In discussing this case we may state that if the state has any priority over the general creditors it must obtain it by virtue of some statute of the state or constitutional provision. In the absence of statutory or constitutional authority, the state as sovereign has no preferential rights in this state. This was settled as the law of this state when the case of Shields vs. Thomas, 71 Miss. 260, 14 So. 84, 42 Am. St. Rep. 458, was decided. But if the Court had not already set at rest this question, we would have no hesitancy in now declaring this to be the law. Some Courts have held the reverse of this. * * * But we adopt the authorities which deny the state priority on any idea of sovereignty."

We contend that the Courts of Michigan, South Carolina and Mississippi have correctly stated the law and that since neither the statutes nor the constitution of Montana confer upon the State of Montana any right of preference in the payment of its demands out of the estate of an insolvent, neither the said State of Montana nor the appellee here is entitled to preference of payment from the assets of the First Trust & Savings Bank of Billings, Montana, in the hands of its receiver.

There is nothing in the case of Bank vs. U. S., 19 Wall. 239, and U. S. vs. Hoar, Fed. Cas. 15373 (incorrectly cited as 15359), cited by the District Court in its decision (Record, page 23) in conflict with the rule that the State of Montana is entitled to no preferential right of payment. The first of these cases was an action of debt to recover certain unpaid taxes and the Court held that the action could be maintained by virtue of statute. There is no determination by the Court of the rule of priority of public debts at common law and it was unnecessary for the Court to decide that question. The latter of the two cases was an action of assumpsit for money had and received brought by the United States against the Defendant as an Administrator. There is no discussion of the rule of priority of public debts at common law and the determination of the Court is that a plea of plene administravit was bad.

2. If, However, The Common Law Prerogative of the King, to be Paid in Preference to His Subjects, Ever Existed in Montana, It Has Been Abrogated by the Provisions of the Revised Codes of Montana of 1907.

Section 6214 of the Revised Codes of Montana, provides:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

In the Civil Code of Montana provision is made with reference to the right of a debtor to prefer one creditor over another, and also with reference to the right of preference of certain creditors where an assignment is made for the benefit of creditors, and in proceedings in insolvency. The provisions referred to on these subjects are as follows:

"Section 6123. A creditor, within the meaning of this title, is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money."

"Section 6124. In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract."

"Section 6125. A debtor may pay one creditor

in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

"Section 6140. In all assignments of property made by any person, association, corporation, copartnership, chartered company or corporation, to trustees or assignees on account of inability of the assignor or assignors at the time of the assignment to pay his or their debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers employed by such assignor or assignors for services rendered within sixty days immediately previous to such assignment, not to exceed two hundred dollars for each person, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of such assignor."

We submit that by the express language of Section 6214 the common law prerogative of the King to a preferential right of payment, if it ever existed in Montana, is abrogated by virtue of the enactment of the sections quoted above. Such sections establish the law of this state respecting the preference of one creditor over another.

Again, Section 6140 having provided that a certain class of creditors shall be entitled to a preference in proceedings to administer upon the estate of an insolvent, it would follow, by virtue of the rule *expressio unius, exclusio alterius* no other claims are preferred. It will probably be contended that a

general statute does not embrace the state, unless the state is mentioned. This, however, is merely a rule of statutory construction, and where it is apparent that it was the intent of the law making body to include the state, such intent will be given effect, although the state is not specifically mentioned.

Guarantee Title & T. Co. vs. Title Guaranty & S. Co., 224 U. S. 152.

The court in the case just cited held that the bankruptcy act of 1898 does not authorize payment to the United States in preference to all other creditors. In the opinion the court said:

"The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants."

It is fair to presume that the legislative assembly of Montana intended, by Section 6140, to legislate with reference to all indebtedness of an insolvent, and that the omission to mention the state as a preferred creditor was not inadvertent.

3. If The Common Law Prerogative of the King to Preference in the Payment of His Debts Obtains As a Rule of Decision in Montana and Is Applicable to the State of Montana as a Sovereign Power, Still Neither the State of Montana Nor the Appellee Here Has Any Preferential Right of Payment Because Under a Recognized Exception to The Common Law Rule the Right of the Sovereign to Preference of Payment Dies the Moment the Debtor's Title Is Divested or the Property Passes Beyond His Control, Unless the Right Has Been Theretofore Exercised.

The Board of Chosen Free-holders of Middlesex County vs. The State Bank at New Brunswick, 29 N. J. Eq. 268—Affirmed 30 N. J. Eq. 311;

Giles vs. Grover, 1 Cl. & Fin. 72—9 Bing. 128;

State vs. Foster (Wyo.) 38 Pac. 926;

State vs. Williams, 101 Md. 529—4 A. & E. Ann. Cas. 970;

Zimmerman, Commissioner of Banking vs. Chelsea Savings Bank et al (Mich.) 125 N. W. Rep. 424;

Hoke vs. Henderson (N. C.) 3 Dev. 17.

In the case of the Board of Chosen Freeholders of Middlesex County vs. The State Bank at New Brunswick, supra, the Court took possession of the State Bank at New Brunswick upon April 3, 1877, and appointed a receiver to convert its assets into money and distribute the same among its creditors

according to law. In January, 1877, the State Treasurer, pursuant to law, deposited nearly $34,000 of the moneys of the state in this bank which stood to his credit as Treasurer when the bank suspended business. On the 7th of July, 1877, the Treasurer filed a petition in the Court appointing a receiver, alleging that the state was a preferred creditor of the bank and praying that the receiver be directed to pay the state's debt first in preference to other creditors. The Court said:

"The claim of the state rests upon a prerogative right of the Crown of Great Britain, the contention being that the state succeeded to all royal rights in virtue of its sovereignty when the crown was displaced here as the sovereign power. * * * It stands on a common law maxim: Quando jus domini regis et subditi concurrunt, jus regi praeferri debet * * * The common method of enforcing this right is by writ of extent by which the debtor's body may be taken and also his goods and lands. * * * In 1832 it was held by the House of Lords in conformity with the opinion of a majority of the law judges that the Crown's right continues as long as its debtor retains title, whether he retains possession of the property or the law has taken custody of it; it will over-reach a prior execution and levy but cannot reach property either partially or wholly aliened by the debtor. Giles vs. Grover, 1 Cl. & Fin. 72; S. C., 9 Bing. 128. It was also held in this case that the Crown's right must prevail against a judg-

ment creditor whose judgment execution and levy were antecedent to an extent in favor of the crown, because the seizure under the prior writ did not change the title, but merely put the property in custodia legis, for the benefit of those to whom the law would ultimately adjudge it; but it was unanimously resolved that if the debtor's title was divested before the teste of extent, the Crown's right against the property was gone."

The Court in the New Jersey case then proceeds to deny the existence of the common law prerogative in New Jersey by reason of the fact that for over one hundred years as an actual practical prerogative of government it has neither been exerted nor recognized. Continuing the Court says:

"But if my examination of the question had led me to a different conclusion, still, I think, the claim could not be sustained. The authorities of both countries unanimously agree that the right dies the moment the debtor's title is divested. No claim was made by the state in this case until after a receiver had been appointed. That appointment vested him with full power to sell, assign and convey all the property of the corporation. No act by the corporation is necessary to complete either the title of the receiver or that of his purchaser. On like proceedings under bankrupt law no assignment by the debtor or commissioners is required. Title is divested by force of law and such divestiture is perfect and absolute."

In the Wyoming case of State vs. Foster, supra, will be found an instructive discussion of the rights of the Crown at common law to have its debts preferred. Referring to the decision in the case of Giles vs. Grover, supra, decided in the House of Lords in 1832, the Court says:

"But the king had the right to pursue his remedy concurrently with the debtor even after the judgment of the latter and even after process had been issued and executed thereon, *if the title to the property remained unaltered in the debtor;* and the king's process in such a case, although issued after the process of the subject, was entitled to preference. The proceedings by the sovereign and subject are aptly termed in the opinion of one of the judges 'a race with the Crown.' It was held that the sheriff holding the property of the king's debtor seized under a fieri facias but not sold could not defeat the subsequent process of the king either by extent in chief, or in aid, which were in effect deemed the same, for the reason that, before the sale of the property seized under the fi. fa., the title to the property had not been divested from the debtor, and the king's process should have preference although subsequent to that of the subject creditor. It was conceded upon argument in the case and so held by the Court that the Crown could not avoid an equitable mortgage or the lien of a factor or of a wharfinger or of 'a bona fide assignment in trust for creditors.' * * * And it

is undoubtedly the rule in England that the transfer bona fide of the debtor's property, while he has absolute dominion over it, defeats the king's prerogative right and his preference and priority are lost. * * * The assignment of the insolvent's property both under the common law and under our statute passed the title; and no process could thereafter run against the property,—either that of the state or the citizen,—or the preference or priority right, if any existed, is thereby defeated."

The Maryland case of State vs. Williams, supra, is one in which the Home Fire Insurance Company of Baltimore became insolvent as a result of the great fire in the City of Baltimore, and upon bill filed Williams was appointed receiver to settle and close up its business. The State of Maryland, by its attorney general, filed a petition in the cause reciting the payment of certain premiums to insure public buildings destroyed by the fire and praying for the payment of certain sums to which the state was entitled in preference to all creditors of the Company. The Court said:

"We think the case of the State vs. State Bank, 6 Gill. & J. (Md.) 206, is decisive against the preference of the state. In that case the general principle upon which the preference or priority of the state over other creditors as against the property of a common debtor were very carefully considered in an elaborate opinion by Chief Justice Buchanan. * * * The Court said: 'It is too late, therefore,

in this day to deny the state's right at common law to have its debt first paid *out of the property of its debtor remaining in his hands* and no lien standing in the way. For, notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principle or spirit of our political institutions. It does not indeed exist here with all the incidents to the royal prerogative right in England. We have not the writ of protection nor the extent in chief or in aid. And the priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid, where the individual creditor has no antecedent lien over-reaching it.' Judge Buchanan then proceeded to inquire whether that was a case in which the state's priority attached or whether it had been defeated by the act of the bank and in considering that action said: 'The debt due from the bank to the state is a debt on simple contract only and not a lien as must be conceded. The state, therefore, having no lien on the property covered by the debt of trust but a priority only in the payment of its claim, if that priority has not been lost, it is subject, claiming under the common law, to the same common law rule applicable to the royal prerogative right of priority in England of the same description. That right in England is enforced by the process in the writ of extent in chief, or in aid, according to the circumstances, and may be held by proceedings known to

our Courts. *But in either case to make it available, the proceedings must be resorted to before other vested rights to the property sought to be subjected to the claim are acquired.'* In support of this statement of the law he cites 2 Tidd's Practice, 1098-1099, where it is said: 'Where goods are bona fide sold or fairly assigned by the king's debtor to trustees for the benefit of its creditors before the teste of the extent, they cannot be taken under it even though in the latter case the debtor was a trader within the bankrupt law and the assignment was an act of bankruptcy.' And Mr. Tidd is sustained by the case of Braddock vs. Watson, 2 Exchequer C., page 6, and Giles vs. Grover, 1 Cl. & F. 72, cited and commented on by Judge Buchanan. In the latter case Lord Chief Justice Tindall states the controlling principle thus 'The actual sale of the property seized under the writ issued at the suit of the subject forms the dividing line so that where the sale is complete before the awarding of the crown process the property is protected therefrom, but where it is not completed, the property may be seized thereunder.' This language is in exact accord with the careful and accurate expression of Judge Buchanan when in the passage above quoted, he limits the state's priority to: 'The property of its debtor remaining in his hands.' And where in a later passage in the same opinion he says: 'If the property be fairly and bona fide changed, or the right of the individual creditor be completed before

the extent, either by sale under a fi. fa., or a valid conveyance to him, or to a trustee for his benefit, the extent coming afterwards will be unavailable, there being no point of time at which the two rights were in conflict and nothing for the extent to act upon after the property ceases to be the property of the debtor.' " (The italics ours.)

In conclusion, the Maryland Court in State vs. Williams, supra, says:

"We do not perceive any reason why any distinction should be made between the effect of such a conveyance as was made in the State vs. State Bank, supra, and the decree in this case based upon a bill praying the dissolution of an insolvent corporation, in which case the receivers appointed by a Court under Section 382 of Article 23, of the Code are vested with all the estate and assets of every kind belonging to such corporation from the time of their qualifying as receivers, and shall be trustees thereof for the benefit of the creditors of such corporation and its stockholders. For the reasons given we are of opinion the priority of the state was properly denied."

In the Michigan case of Zimmerman, Commissioner of Banking vs. Chelsea Savings Bank et al, supra, the Court says:

"Without treating the action of the Banking Commissioner in closing the Chelsea Bank as the precise legal equivalent of a fair and bona fide assignment by the bank of its assets for a valuable

consideration, it is nevertheless true that the proceedings taken passed all the property of the bank beyond its power or control. This being the result of enforcement of the state law should have an effect equal to an assignment for benefit of all creditors. Such an assignment could not be avoided by the Crown nor could it lay claim to goods seized by the sheriff on fi. fa. and sold (citing cases). The principle proceeded upon seems to be that the right of priority of the sovereign attaches, as does the right of any lienor, only upon seizure under or enforcement of the proper writ. We do not hesitate to say that, assuming the right of priority contended for to exist in this state, the Courts, in the absence of any assertion of the right by the state, and after the debtor has been divested of all control of its property in proceedings authorized by and following the statutes of the state, should not, sua sponte, assert the right in favor of a guarantor of the debtor."

In the above cited North Carolina case of Hoke vs. Henderson, the Court says:

"If the subject hath sold the goods of the king's debtor before the sovereign sues execution, the sale is not disturbed. It is no longer a question of preference of satisfaction, for the goods have ceased to be the debtor's for any purpose."

None of the following cases in any way qualifies or denies the existence at common law of the exception recognized by the foregoing cases to the rule

that the Crown is entitled to preference in the payment of its debts, to-wit:

In re Tyler, 149 U. S. 164;

Wise vs. L. & C. Wise Co., (N. Y.) 47 N. E. 788;

Central Trust Co. of New York vs. 3d Ave. Railway Co. et al, 186 Fed. 291;

U. S. Fidelity & Guaranty Co. vs. Rainey et al (Tenn.) 113 S. W. 397;

In re Carnegie Trust Co. (N. Y.) 99 N. E. 1096.

There is nothing in the case of In Re Tyler, supra, or any authorities referred to in the Court's opinion that determine the question of the right of a sovereign state at common law to priority in the payment of debts due the state, or that lay down any qualification of the above considered exception to the rule. The only question determined is that a state even as against property in the hands of a receiver has a claim prior to all other creditors for taxes levied upon property; but this holding is based upon the fact that the statute created a lien upon the property.

In the case of Wise vs. L. & C. Wise Co., supra, the only question determined was whether taxes assessed upon personal property of a corporation and which became due subsequent to the levy of an attachment and execution thereon at the suit of creditors are a prior lien upon assets in the hands of a receiver for distribution. The right of preference was denied. The doctrine of this case is expressly affirmed by the Circuit Court of the United

States for the Southern District of New York in Robinsin vs. Mutual Reserve Life Insurance Co., 175 Fed. 624, where the Court says:

"In the case of the Columbian Insurance Company, where a preference was allowed, there was a lien for the taxes on the company's property before receivers were appointed. In the case of Wise vs. Wise Co., where a preference was denied, the taxes became due after the levy of an attachment. The case under consideration differs from the first in that there was no lien for the state's claim before receivers were appointed and from the second in that the state does not ask for a preference over any prior specific lien. But Judge O'Brien's language in the latter decision seems to me to clearly exclude the state from any preference in this case over the general creditors."

The case of Central Trust Co. of New York vs. 3d Ave. Railway Co. et al, supra, was an action by the Trust Company against the Railway Company and from an order on a claim by the people of the State of New York they appealed. The property of Defendant was in the hands of a receiver. The Court said:

"We regard it as settled law in this state that the state does not succeed as sovereign to all the prerogatives of the British Crown, among others the right to a preference for debts due it over all other creditors. It has been expressly held that taxes due the state have no priority of payment out of a fund

in Court for distribution unless the priority was expressly given by statute or unless the fund has come into the Court impressed with a priority for the tax."

The Court further said:

"The Circuit Court of Appeals for the 8th Circuit in the State vs. Central Trust Co., 94 Fed. 244, held the State of Minnesota to be entitled to priority of payment even out of personalty of all debts due it over every other debt. This conclusion was rested upon the rights of Minnesota as a sovereign without reference to statute, which, as we have seen, is not the law of this state." (P. 294).

An examination, however, of the case referred to by the court, discloses the fact that the decision is based upon a statute and not upon any rights of the State of Minnesota as a sovereign, as will appear from the following language found in the opinion:

"In the case in hand it is not necessary to infer the existence of a lien for the taxes in controversy because of the character of the indebtedness, as has been done in some cases, since the state statute has in unmistakable language given a lien therefor upon all the personal property of the taxpayer owned by him when the tax lists are received by the County Treasurer." (P. 248).

The case of U. S. Fidelity & Guaranty Co. vs. Rainey et al, supra, is a suit in the nature of a creditor's bill and was brought against various

creditors of Rainey who might be interested in any fund or funds paid into the hands of Rainey as Clerk of the Circuit Court and for which he was liable on his official bond. The Complainant Company stated that it was ready and willing to pay whatever sum might be necessary under the bonds furnished by it as soon as the proper amount of each bond was determined, and asked for a complete account of the office and exact amount due from Complainant by reason of its surety. Answers were filed by the state, county, etc., averring that Rainey was indebted to the authorities for a large amount of state and county taxes which he had failed to pay over. The Court determined that taxes of the state were entitled to priority as against the general creditors of Rainey. The Court says:

"It is undeniable that by the common laws of England the sovereign, by virtue of his prerogative rights, was entitled to priority of payment of debts due him over debts due his subject. * * *We are of opinion that the prerogative right of the sovereign to receive payment of fines, forfeitures, taxes and revenues and such demands as were due it in its sovereign capacity was a part of the common law transmitted to this state from North Carolina and that the decree of the Chancellor was correct in adjudging priority to the state in the collection of its delinquent revenue on this bond."

The attention of this Court, however, is respectfully directed to the fact that the assets of the debt-

or *were in his hands* at the time the state asserted its right to priority of payment; that the said assets had not passed to a receiver, neither were they assigned to a trustee for the benefit of creditors. The Tennessee case, therefore, determines only the right of the sovereign at common law to preference in the payment of debts and involves no adjudication of the exception to this sovereign right which also existed at common law. In other words, the title to the debtor's property had not been divested at the time the state asserted its right.

In the case of the Carnegie Trust Co., supra, which in the lower court is reported in 136 N. Y. Sup. 466, the Trust Company became insolvent and passed into the hands of the Superintendent of Banks of the State of New York. In the lower court it was found that the Treasurer of the State of New York was not entitled to priority over the claims of the general creditors of the company for certain funds deposited with the trust company, but that his claim should be allowed as a general claim against the company. Upon appeal this was reversed. The decision upon appeal is based upon the rule that at common law the king was entitled to preference in the payment of debts due him from an insolvent before that of a subject. Counsel for appellant contend, however, that the decision in the Carnegie Trust Co. case is clearly distinguishable from the one at bar. It was unnecessary for the Court to determine what exception to the rule of

priority existed at common law for the reason that the facts in the case do not bring it within any recognized exception to the rule. The Superintendent of Banks of the State of New York was in possession of the insolvent bank, but the title to the trust company's property had not passed to the Superintendent of Banks. For this reason, under the general rule of priority at common law, the state was entitled to preference of payment.

In the following cases the right of the state to priority of payment of its debts is recognized but in each instance this right is based upon a positive statute conferring the right:

State vs. Bell, 64 Minn. 400—67 N. W. Rep. 212;

State vs. Northern Trust Company, 70 Minn. 393—73 N. W. Rep. 151;

Insurance Commissioner vs. Commercial Mutual Insurance Co., 20 R. I. 7—36 Atl. 930.

Counsel for appellant contend that under the numerous authorities cited above, there is neither in England nor in this country any recognized qualification or denial of the existence of the rule of law under which the right of the sovereign to preference in the payment of his debts dies the moment the debtor's title is divested unless an assertion of the right by the state has theretofore been made.

A different rule appears to have been announced in Georgia.

Seay vs. Bank of Rome et al, 66 Ga. 609.

In the Georgia case, supra, the defendant bank became insolvent and was placed in the hands of a receiver. The bank had certain state funds on deposit secured by surety bond as required by the state depository law. This law gave the state a lien from the date of the execution of the bond upon the property of the bank to the extent of the amount of the bond. After decreeing the state to be entitled to preference of payment to the extent of the lien, the Court said:

"The next and last question we shall consider is as to the right of the state to priority of payment out of the estate of the insolvent aside from the bond, for the excess of the claim of the state above the amount of the bond."

The right of priority as to this excess was then upheld by the Court. This conclusion is based upon Robinson et al vs. Bank of Darien, 18 Ga. 65 and State vs. Dickson, 38 Ga. 171. In each of these cases cited by the Georgia Supreme Court in Seay vs. Bank of Rome as authority for the rule announced, the broad rule of priority of state demands at common law is decreed to be the rule of decision in Georgia without any recognition of an exception to the rule. While the decision in Seay vs. Bank of Rome establishes the rule in Georgia that the state is entitled to preference of paymenet even where the debtor's title has been divested, it is submitted that the case is not carefully considered, that the rule is in conflict with that established in

England and in all other jurisdictions in the United States where the Courts have had occasion to decide the question, and that the rule established by the Georgia Court should not upon all other precedent and authority form the rule of decision in this case.

A: The Title of the First Trust and Savings Bank of Billings, Montana, To All Its Property and Assets Was Divested Prior to the Exercise of Any Sovereign Right by the State of Montana or by the Appellee Here, to Preference of Payment.

The District Court in its decision (Record, page 25) recognizes that the right of the sovereign to preference in the payment of its debts cannot be asserted after the debtor's title to the property out of which it is sought to make the public debt, has been divested; but the District Court has determined that the title to the property here involved in the hands of the receiver appointed on the state's petition has not been divested. This, counsel for appellant contend, is not the law.

The proceedings initiated by the State of Montana, wherein a receiver was appointed for the First Trust and Savings Bank of Billings, Montana, were taken under the provisions of Chapter 141, Laws of Montana, 1909. This Chapter amends Section 4004, Revised Codes of Montana, 1907, but makes no substantial change in said Section 4004 other than to extend the powers of the State Examiner. Both Section 4004 and Chapter 141 provide for the appointment of a receiver of an insolvent bank upon petition of the attorney general in the name of the

state filed in the proper District Court of the state. Section 4004 expressly provides that the receiver so appointed shall wind up the affairs of the corporation, and while Chapter 141 does not in terms specify the receiver's duties in this respect, counsel for appellant contend that the law has not been changed and that the manifest and clear intent of said Chapter 141 is that the affairs of an insolvent banking corporation, upon the appointment of the receiver provided for therein, shall be wound up. If the condition of insolvency should be made good after the notification to the bank's stockholders provided for by said Chapter 141, or after the State Bank Examiner takes possession of the books, records and assets of the bank, it might be contended that the corporation could resume, but if the condition of insolvency is not remedied, and this condition has not been made good in the case at bar, the manifest purpose of the statute then is that as a last resort a receiver shall be appointed and such appointment can manifestly be for the sole and only purpose of terminating the life of the corporation, paying its creditors and winding up its affairs. That the First Trust and Savings Bank of Billings, Montana, is hopelessly insolvent and cannot pay all of its just claims in excess of approximately 60 per cent is alleged by Complainant in its Bill (Record, page 5) and admitted by the Defendant in his Answer (Record, page 16). That under such condition it is unlawful for the banking corporation to

accept or receive deposits of money or to transact any other business as a banking corporation is manifest from the provisions of Section 4007, Revised Codes of Montana, 1907, and that, therefore, not being permitted to do a banking business, the banking corporation must be dissolved and wound up.

Section 4, Chapter 141, Laws of Montana, 1909, providing for the appointment of a receiver of an insolvent bank, does not define the duties and powers of the receiver other than to require the receiver to make certain annual reports to the State Bank Examiner. The conclusion of the District Court in its decision of this case (Record, page 25) is that while the receiver is statutory to the extent that he is appointed by virtue of statutory authority under circumstances not of themselves warranting the appointment by a Court of Chancery, yet he has no greater or other rights and powers than those of a chancery receiver, for the statute creates none, and that such a receiver does not take title to the property involved.

The conclusion of the District Court is supported by no citation of authority. It fails to take into consideration Chapter VI, Part II, Title VII, Revised Codes of Montana, 1907, relating to receivers, and does actual violence to the provisions of Section 6703, relating to the powers of receivers, and included within said Chapter VI, supra. The failure of Chapter 141, Laws of Montana, 1909, to designate the rights and powers of the receiver provided

for therein does not leave the receiver without rights or powers nor limit his rights and powers to such as were possessed formerly by a receiver under an appointment by a Court of Chancery. The District Court, in its decision, says that the receiver in the case at bar "has no greater or other rights and powers than those of a chancery receiver for the statute creates none." This is not the law.

Section 6698, Revised Codes of Montana, 1907, included within the general chapter relating to receivers, provides for the appointment by the Court in which an action is pending or by the Judge thereof of a receiver in a number of cases, including cases when a corporation has been dissolved or is insolvent. It has been decided that said Section 6698 specifies all the cases whether at law or in equity in which receivers can be appointed.

Bateman vs. Superior Court, 54 Cal. 285;
State Ex. Rel. New York Sheep Co. vs. Eighth Judicial District Court, 14 Mont. 598.

It, therefore, necessarily follows that Chapter 141, Laws of Montana, 1909, in so far as it provides for the appointment of a receiver of an insolvent banking corporation, must be read in connection with Section 6698, supra. There is nothing inconsistent in these separate provisions of the Montana statutes, and it might well be contended that had Chapter 141, Laws of Montana, 1909, wholly failed to provide for the appointment of a receiver upon

application of the state, the State of Montana could, nevertheless, as a creditor of the bank, acting under the provisions of Section 6698, Revised Codes of Montana, 1907, and upon allegations of such a condition of insolvency as is admitted by the pleadings to exist in the case at bar, have secured the appointment of a receiver for the Bank. Such being the case, it is manifest that the provisions of Sections 6698 to 6704, both inclusive, comprehended within Chapter VI, Part II, Title VII, supra, relating to receivers, regulate and determine the rights and powers of the receiver appointed in the case at bar; and Section 6703 distinctly specifies the powers of receivers and reads as follows:

"Section 6703. Powers of Receivers.—The Receiver has, under the control of the Court, power to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the Court may authorize."

Whether, therefore, Chapter 141, Laws of Montana, 1909, contemplates the winding up of the affairs of an insolvent banking corporation or not, it is, nevertheless, clear that the powers of the reciver, provided for by said Chapter 141, are expressly defined by Section 6703, supra.

Said Section 6703 appears verbatim as Section 5406, Revised Codes of North Dakota of 1899, and

has received judicial construction by the Supreme Court of North Dakota in the case of Brynjolfson vs. Osthus et al (Decided in 1903), 96 N. W. Rep. 261. In that case, which involves a receivership of an insolvent corporation, the Court said:

"It should require no argument to show that the delivery of the deed to her by E. A. Mears subsequent to the appointment of a receiver was of no effect. The Bank of Minot, the grantor, was then in the hands of a receiver, and its officers were stripped of authority to make a delivery, and not only would the appointment of a receiver deprive the officers of the bank of the power to do any further acts which would affect the corporation or its property, but it had the further effect of transferring the title and right of possession of all the property of the bank to the receiver. The appointment of a receiver of an insolvent corporation operates as a suspension of its corporate functions, and of all authority over its property and effects. High on Receiver (3d Ed.) Section 290; Linville vs. Hadden (Md.) 41 Atl. 1097, 43 L. R. A. 222. Further, the title and right of possession of all property of the insolvent corporation, both real and personal, passed to the receiver, as the officer of the Court appointing him, for the use and benefit of the creditors of the insolvent. Section 5406, Revised Codes; Attorney General vs. Insurance Company, 100 N. Y. 279, 3 N. E. 193; Morgan vs. R. Co., 10 Paige 290, 40 Am. Dec. 244; Attorney General vs.

Insurance Co., 28 Hun. 360, affirmed in 93 N. Y. 630; Receivers of Corporations (Gluck & Becker) Chapter 1, Section 5; Osgood vs. Maguire, 61 N. Y. 524; High on Receivers, Section 136. It follows from what we have said that the note and mortgage, which the evidence shows were owned by the Bank of Minot, were not transferred to Eliza V. Hoffman by the Mears' deed, but that they did in fact pass by operation of law to the receiver, Lewis, and that Plaintiff became and now is, the owner thereof, under his purchase from Guptill, Lewis' successor in the receivership."

Said Section 6703 has received judicial construction by the Supreme Court of Montana in the case of B. & M., Consolidated Copper & Silver Mining Co. vs. Montana Ore Purchasing Co. et al, 24 Mont. 142, and upon a further appeal of this case the Court, in its opinion, said:

"The first appeal was from an order vacating a temporary restraining order. It was held upon that appeal that the District Court did not err in dissolving the Order, it being made to appear that a receiver for the Plaintiff had theretofore been appointed in another cause, who had qualified; and it followed from such showing that the Plaintiff had no capacity to sue, but that the right of action, if any existed, was, by the fact of appointment and qualification of the receiver, vested in him under Section 955 of Code of Civil Procedure." (27 Mont. 431).

Section 955 of the Code of Civil Procedure referred to by the Court refers to the Revised Codes of 1895, and said Section is reproduced in the Revised Codes of Montana, 1907, as Section 6703, supra.

In Attorney General vs. Atlantic Mutual Insurance Co., (N. Y.) 3 N. E. 193, the Court said:

"The receiver, upon his appointment, became vested with the title to all the property of the company, including its real estate. Section 7 of the Act of 1869 authorized the Court to appoint 'a receiver of all the assets and credits' of the the company, and provided that the receiver, upon filing his bond, should 'take possession of all the assets and credits' of the company. The word 'assets' where it is used in the several sections of that Act, manifestly means all the property, real and personal, of any company coming under its provisions. No provision is made in the Act for any formal conveyance to the receiver, and it cannot be supposed to have been the intention of the Legislature to leave the title to its real estate in the insolvent company subject to the risks of judgment liens or other complications. The purposes of the Act require that such title should at once vest in the receiver, and we think the Act should receive such a construction as to effectuate such purpose. It is not a general rule that a receiver can only take title from an insolvent person or corporation by formal conveyance."

The following authorities further establish the

rule announced in the above cited cases:

Ryan vs. Kingsberry (Ga.) 14 S. E. 606;

Cobb et al vs. Camden Savings Bank (Me.) 76 Atl. 670;

American Nat. Bank of Denver vs. Nat. Benefit & Casualty Co. et al, 70 Fed. 420;

Strout vs. United Shoe Machinery Co., 195 Fed. 313 and 321.

The foregoing authorities definitely and conclusively establish that upon the appointment of the receiver for the First Trust & Savings Bank of Billings, Montana, the title to all of its property, both real and personal, became vested in the receiver; and by virtue of this fact, the title of the state's debtor having been divested prior to the institution of any proceedings by the State of Montana or by the appellee here by virtue of any subrogation, it necessarily follows that any right to preference of payment either of the state or of the appellee has been lost.

B: By the Appointment of the Receiver the Bank Lost Control Over the Property and the Same Was Placed Beyond the Reach of Any Creditor.

We submit that it is wholly immaterial whether the title to the property of the bank passed to the receiver. In any event the property, after the appointment of the receiver, could not be disposed of by the bank or reached by any process to enforce the claim of a creditor, and was just as effectually beyond the control of the bank and protected against

seizure by the state as a creditor as though the same had been sold by the bank and possession delivered.

Gardner v. Caldwell, 16 Mont. 221;

Ex Parte Tyler, 149 U. S. 164.

The exception to the common law prerogative of the king of a preferential right of payment was based on the fact that the property had passed beyond the right of disposition and right of control by the debtor. This ordinarily occurred by the debtor parting with his title, but it was not necessary to the exception that title should be divested, provided the debtor lost control, possession, and the right of disposition of the property.

In the following cases it was decided that the appointment of a receiver precluded the state from asserting a right of priority of payment.

Board vs. Bank, 29 N. J. Eq., 268;

State vs. Williams, 101 Md. 529;

Zimmerman vs. Bank, 125 N. W. 424.

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4. If the Prerogative of the Crown to Preference of Payment Is Now a Prerogative Right of the State of Montana as a Sovereign Power, The Appellee Here Is Not Subrogated to Such Right Since the State of Montana Has Failed to Exercise Its Prerogative Right in the case at Bar.

In the case of Zimmerman, Commissioner of Banking, vs. Chelsea Savings Bank et al, 127 N. W. Rep. 351, the Court says:

"We said in the foregoing opinion, concerning the question of the prerogative right of the state as creditor to be preferred to other creditors of the debtor: 'The question is not presented for decision in this case, unless, assuming the right to exist, the intervening surety may insist upon the exercise of the right by the state.' We proceeded then to apply the rule that at the common law the right of the sovereign to priority over other creditors of a debtor was one which must be asserted before the assets of the debtor had passed beyond his control. On the application for rehearing it was urged that the opinion did not meet the contention that the intervening petitioner is, as to the state, a surety of the debtor, and that the state itself, by its officers, instituted the action which divested the debtor of its property. The opinion does not answer precisely this contention, for which reason and because one of the justices who took part in the decision had left the bench before the motion for rehearing was presented, it was ordered that the cause be reheard.

"In the former opinion some reference is made to authorities. Further references are: (citing cases). The cases arose upon the assertion in some form of the alleged right of the state. The opinions relied upon by appellant are judicial assertions that in the particular jurisdiction this prerogative right of sovereignty, as recognized by the common law, has been asserted by the very act of adopting the

common law into the jurisprudence of the state, and therefore may be enforced by the Courts. This is the form of the contention made by appellant, and it is this alleged right of the state which it is claimed should have been exercised in the particular case, and that the surety stands, before the law, in the position it would have occupied had the state exercised the right. A royal prerogative is an arbitrary power vested in the executive, a power or will which is discretionary and uncontrolled (2 Bouvier ((Ralle's Rev.)) 730) and in some, if not all, of the decisions which have been examined the term 'prerogative' is evidently employed in the sense that it is an arbitrary power of the state, as distinguished from a sovereign power, which becomes effective in exercise thru legislation. It is clear that no one may complain because the sovereign has not exercised a discretionary and arbitrary right. The argument made for appellant is thus completely answered."

In this case the intervener, after paying to the State of Michigan its obligation as surety under a bond given to protect the State in deposits made in the defendant bank, intervened in the proceeding to liquidate the assets of the bank, claiming a right of preference of payment by virtue of a subrogation to the state's rights. The prayer of the intervener was denied for the reasons given in the opinion above quoted.

In the case at bar the State of Montana has not

asserted a prerogative right to preference of payment but has, as appears from Exhibit A attached to Complainant's bill (Record, page 8), made proof as a general creditor only and accepted from the receiver a certificate in the usual form of such indebtedness. Under these facts, and applying the rule in Zimmerman vs. Chelsea Savings Bank, supra, we contend that the appellee here is not entitled to preference of payment out of the assets of said Bank. The Court in the above cited case has clearly announced the rule to be that there is no subrogation by a surety to a prerogative right of the state to preference of payment where the state has failed, as in the case at bar, to exercise the prerogative.

The rule announced in the foregoing case of Zimmerman vs. Chelsea Savings Bank is not in conflict with the doctrine expressed by the Supreme Court of the United States in Hunter vs. United States, 5 Pet. 173. In the latter case the Court says:

"The same right of priority which belongs to the government attaches to the claim of an individual who as surety has paid money to the government."

The decision in this case is based entirely upon a statute creating the right of preference. There is no consideration by the Court of a prerogative right as distinguished from a statutory right and for this reason the case is clearly distinguishable from the

case of Zimmerman vs. Chelsea Savings Bank, supra. The case of Hunter vs. United States is a leading case upon the doctrine there announced, but so far as our examination has extended, we have found no cases in any jurisdiction where the doctrine of Hunter vs. U. S. has been applied that are not in like manner decided with reference to a statutory right as distinguished from a prerogative right.

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5. The Right of the Appellee Here Under the Assigned Claim of the State of Montana Is Only That of a General Creditor.

In the case at bar the State of Montana has made proof that it is a general creditor of the First Trust and Savings Bank of Billings, Montana, (Record, page 8) and has received from the receiver of said bank a receiver's certificate. This certificate has been assigned by the State of Montana to the appellee.

If appellee is not entitled to a preference by virtue of the doctrine of subrogation there can be no right of preference by reason of the assignment of the receiver's certificate. In other words, the right by assignment cannot be greater than the right by subrogation. Assuming that the state had a right of preference which it might have exercised, as it failed to do so and the title had passed from

the debtor and the right to claim a preference was gone at the time of the assignment, there could be no right of preference conferred upon appellee by the assignment. Of course, if there is no preferential right to payment by the state, as we maintain, the assignment did not confer such right on appellee irrespective of the fact that the assignment was not made until after the receiver was appointed.

* * * *

For the reasons given in the foregoing Brief of Argument, counsel for appellant submit that the appellee is not entitled, with respect to the assets of the First Trust & Savings Bank of Billings, Montana, in the hands of its receiver, to rank as a creditor preferred to all other creditors, but that the appellee is merely a general creditor entitled to dividends as they are declared, distributed and paid to the general creditors of the bank, and then only in the same ratable proportion as all of the general creditors are paid. Counsel further submit that the decree of the United States District Court for the District of Montana is, therefore, erroneuos and should be reversed.

* * * *

The complaint alleges: "The complainant herein was authorized to begin and prosecute an action against the said receiver for the relief herein prayed." (Record, p. 6).

This authority does not authorize an action in

the federal court of Montana.

Porter vs. Sabin, 149 U. S. 473.

Respectfully submitted,

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Attorneys for Appellant.

6.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,

Appellant,

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,

Appellee.

BRIEF OF APPELLEE.

WALSH, NOLAN & SCALLON,

Solicitors for Appellee.

This cause presents no disputed question of facts. All the material allegations of the bill are expressly admitted by the answer. It was heard upon the bill and answer and the sole question was that of whether the State of Montana and the complainant, its assignee, subrogated to its rights, may claim a preference in the distribution of the assets of the insolvent First Trust and Savings Bank of Billings.

I.

The claim of the complainant rests upon the general proposition that at the common law debts due the Crown were payable in preference to those due the subject, and that a levy upon the property of the common debtor to satisfy the claims of the subject gave place to a later levy at the suit of the sovereign.

> "It is undeniable that by the common law of England the sovereign, by virtue of his prerogative rights, was entitled to priority of payment of debts due him over debts due his subjects. 8 Bacon's Abridgment, tit. 'Prerogative,' p. 91; 1 Kent's Commentaries (14th Ed.) *257; Blackstone's Commentaries, book 1, p. 240, foot page 210; id. book 2, star pages 409, 511, foot page 833 (4th Ed.); Giles v. Grover, 9 Bing. 128."
>
> U. S. Fidelity & Guaranty Co. v. Rainey et al., 120 Tenn. 157, 113 S. W. 397 at 408.

The rule had its foundation in public policy that the state might not be embarrassed for the necessary funds with which to carry out the purposes of its existence. In our country the prerogatives of the Crown, so far as they are consistent with republican institutions, have vested in the various state governments, and it has, accordingly, been held in many states that the claims thereof are entitled to the same priority as those of the Crown of England in the distribution of insolvent estates, estates of decedents, etc.

Section 3552 of the Revised Codes of Montana, 1907, provides as follows:

> "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, or of the codes, is the rule of decision in all the courts of this state."

This section expresses the law of this state since the beginning of its political existence. The idea was thus expressed in the "Bannack" statutes, passed in January, 1865:

> "Sec. 1 That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority."
>
> Statutes of 1864-5, p. 356.

Although it is held in some states that the rule above stated forms no part of the common law of this country, the general compilations tell us that the weight of authority is to the effect that it is and that the state enjoys the same preference as did the King of England.

> 36 Cyc. 871.
> 26 Am. & Eng. Ency. of Law, 479.
> 8 Id. 1047.

It is asserted by the courts of the following states, viz.:

Maryland:

> State of Maryland v. Bank, 6 Gil. & J. 205, 26 Am. Dec.. 561.
> State v. Mayor, 10 Md. 504 (referred to in note to 26 Am. Dec. 561).

New York:

> In re Carnegie Trust Co., 136 N. Y. Supp. 466, same case on appeal 206 N. Y. 390; 99 N. E. 1096.

North Carolina:

> Hoke v. Henderson, 14 N. C. 12.

Tennessee:

> U. S. Fidelity & Guaranty Co. vs. Rainey, et al., 120 Tenn. 157, 113 S. W. 397.

Georgia:

Seay v. Bank of Rome, 66 Ga. 609.
Booth v. State, 131 Ga. 750, 63 S. E. 502.

Wyoming:

State v. Foster, 5 Wyo. 199, 29 L. R. A. 226.

The priority was, likewise, recognized in Pennsylvania until the rule was modified by statute.

See Commonwealth v. Lewis, 6 Binn. 266,

and cases collected in note to State v. Foster, 29 L. R. A. on pages 243-244.

It is denied in New Jersey, South Carolina, Mississippi and Michigan.

Clearly this right of priority is not, in the language of our code "repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state or of the codes," nor can it be said of it, in the language of the Bannack statutes, that it is not "applicable and of a general nature," or that it is "in conflict with special enactment" of our legislature.

In Dollar Savings Bank vs. U. S. 86 U. S., 19 Wall, 227, cited in the opinion in the court below, it is said:

> "It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity as *parens patriae*, or universal trustee, enters as much into out political state as it does into the principles of the British Constitution."

II.

THE STATE'S RIGHT TO PRIORITY HAS NOT BEEN ABROGATED.

The contention of appellant that the provisions of the Montana Codes cited by it, viz. Sections 6214, 6123-6125 and 6140 have abrogated the right of priority, cannot be sustained. Section 6214 does not abrogate the common law as a whole. Indeed, where the Code contains no provision on any given subject, the common law is expressly kept in force by the Codes. Section 3552, quoted both in appellant's brief and in this brief, expressly so declared. Section 6214 is a rule of interpretation. Its purpose was to prevent a strict construction of the Code, under the rule that statutes in derogation of the common law are to be strictly construed. Section 8060 also quoted in appellant's brief, positively provides that where the law is not declared in the Code or in a statute, the common law shall be the law, and the rule of decision, if it be applicable and of a general nature and not in conflict with the code or other statutes. (Appellant's Brief page 5.)

This is, in effect, a repetition of section 3552, with, possibly, some added emphasis.

It must follow that unless the common law right of priority of the state is in conflict with some provision of the code, it has not been abrogated. The only one of the sections cited by appellant upon which any argument can be based in favor of the alleged abrogation is section 6140. It is quite evident that this section was never intended to abrogate any liens, or any rights of priority of payment over general creditors.

It was intended to create additional liens or rights of priority and, perhaps, to prefer them over other preferred claims but not to abrogate any. That section establishes rights of priority in favor of miners, mechanics and other employes for wages and salaries for limited periods. To say that such a section excludes all other liens would be to say that the state's right of priority for taxes levied would be destroyed by it, and such a proposition would not be entertained. It may possibly have the effect of preferring the claims mentioned in that section over other debts. It, doubtless, would require such claims to be paid in preference to general creditors, and also prior to any preferences created by the assignment itself, but it does not follow from that that as against general creditors, the priority of the state would not still obtain.

The case cited by appellant, viz,

Guaranty Title & T. Co. v. Title Guaranty & S. Co. 224 U. S. 152,

does not support its contention, and is, really, an argument in favor of the decision of the court below in this case. The case cited involved merely a question of priority and of preference between the United States as a creditor, and labor claims, under the provisions of the Bankruptcy Act of 1898. It was held that under the Act of 1898, labor claims are to be paid next after taxes and in preference to all other debts. No such question arises here. There is no conflict here between the claims of the state or its subrogee and any labor claim. It does not appear from the pleadings that there are any other preferred claims or liens or claims having priority. On the contrary, it appears from the answer, by implication at least,

but by necessary implication, that there are no privileged or preferred claims. The answer avers that a dividend of twenty per cent has been paid, but that it is doubtful whether the receiver will be able to pay sixty per cent on the claim of the complainant, such dividends involve, of course, ratable distributions. Nothing is said in the answer about any labor or preferred claims. It must, therefore, be taken that there are none in existence. So, we have here a case of the state on one side and general unpreferred creditors on the other. The decision of the Supreme Court is really an authority in our favor. It upholds the proposition already decided by previous cases: "That the United States, as a sovereign, is not bound by the general language of a statute, and is not bound by the provisions of an insolvency law, unless specifically mentioned therein." This rule is, of course, applicable to the state with equal force, in so far as state laws are concerned. There is nothing in the statute which indicates any intention to affect the rights of the state or to abrogate its common law rights. Under the rule just stated, as well as under the other rule of interpretation that repeal by implication are not favored, it must, therefore, be held that the state is not bound by the general language of a statute or by a state insolvency law, unless specifically mentioned therein. The case above referred to is also instructive in another respect. In the very sentences quoted by appellant, the court calls attention to the nature of the provisions of the Bankruptcy Act of 1898. It notes especially that that Act takes into consideration "the whole range of indebtedness of the bankrupt—national, common, state and individual—and assigns the order of payment." It

cannot be said that section 6140 takes into consideration "the whole range of indebtedness" of the insolvent and assigns the order of payment. All that that section does is to take into consideration one class of claims, namely, labor claims, and it prefers them over the claims of other creditors. Especially when read in connection with Section 6142, it seems clear that the only purpose and effect of section 6140 is to provide for labor claims which otherwise would be left without protection.

The rule *expressio unius, exclusio alterius* cannot be invoked for the very simple reason that the section does not purport to declare what priorities or liens shall be allowed, but merely to establish a right of priority, in favor of persons who otherwise would not be entitled to any.

This matter, however, is not left open to argument. The code itself concludes it. Section 6142 provides:

> "CERTAIN RIGHTS NOT AFFECTED BY PREFERENCES IN ASSIGNMENT.—No provision in an assignment, giving a preference to a creditor, can affect or impair any right of another creditor to priority of payment, *whether created by law, or arising from an obligation or transaction of the parties.*" (Italics ours).

By this section, all rights of priority, including those "created *by* law" are preserved. In view of this express provision it certainly cannot be said that an assignor can, by his assignment, destroy rights of priority.

III.

THE APPOINTMENT OF A RECEIVER TO THE TRUST COMPANY DID NOT AFFECT THE RIGHT OF PRIORITY; NO MATTER WHAT

THE CHARACTER OF THE RECEIVER'S RIGHT OR ALLEGED TITLE MAY BE HELD TO BE.

The appointment of the receiver to the trust company was made, as stated in appellant's brief, in pursuance of section 4004 of the Revised Codes of 1907, as amended in 1909. (Statutes of 1909, page 218.) This section as amended reads as follows:

"I. Section 4004. IMPAIRMENT OF CAPITAL. DUTIES OF STATE EXAMINER. Whenever the State Examiner, after a full and careful examination of the affairs of any banking corporation, trust deposit and security company or savings bank, organized under the laws of Montana, or any foreign corporation or branch thereof doing a banking business in Montana, shall find evidence of impairment or insolvency, he shall immediately prepare and submit a statement of its condition to the Governor and Attorney General, and if the Governor and Attorney General are satisfied from such statement that such impairment or insolvency exists, they shall order the State Bank Examiner either (1) to notify the bank's stockholders to make good such impairment or insolvency in a specified time, or (2) to immediately take charge of such bank or trust company and to furnish an official bond for such sum as they designate.

2. If so ordered, the State Bank Examiner shall forthwith take possession of the books, records, and assets, and shall be authorized and empowered, and is directed to take such action as, in his judgment, is best for the protection of the depositors and stockholders of such bank.

While in charge of the State Bank Examiner, the books, records and assets shall not be subject to any levies or attachments.

3. If the stockholders do not make good the impairing or insolvency within the time required after notification, the State Bank Examiner is authorized to take charge of such Bank, its property and assets, upon direction of the Governor and Attorney General.

4. It appearing necessary to have a Receiver appointed for any such Bank or Banks, the State Examiner shall make full and complete statement of account and report to the Governor with respect to the condition of its business and affairs; and thereafter, should it appear to the Governor that application should be made for the appointment of a Receiver, he shall thereupon direct the Attorney General to file a petition in the District Court of the County in which the Bank is situated, asking for the appointment of a receiver, in the name of the State of Montana, and such petition shall be controlling, and by the Court so considered and acted upon, even though stockholders, creditors, or others, may have theretofore filed applications for the appointment of a Receiver. When any such petition is filed by the State, no suggestion shall be contained therein as to any particular person to be appointed in such capacity. Receivers of all insolvent Banks shall make reports to the State Bank Examiner in the same manner as is required of other Banks, at least three times each year, when called upon to do so, or at any time when requested by the State Bank Examiner. Any Receiver who refuses to submit the affairs of such Bank to an examination by the State Bank Examiner or his Assistants, or fails to make report when called for by said officer, or who violates any of the provisions of law relating to examination of banks, shall be subject to removal.

5. The Receiver provided for in this Section shall receive such compensation as shall be allowed by the Court, but in no event to exceed the fees allowed executors and administrators in administration of estates.

6. The expense for traveling, hotel bills and time actually spent, incurred by the State Bank Examiner's office in performance of the duties imposed by this Section, shall be paid in full by the Bank to the State Treasurer and by him credited to the State Examiner's fund."

We do not admit the correctness of appellant's interpretation of the effect of the amendment of 1909. The omissions from the original section, as well as the additions to it, must be taken to be the result of a deliberate purpose and intention on the part of the Legislature. But, for the purpose of the dis-

cussion of the point with which we are now dealing, it may be assumed that the appointment of a receiver was for the purpose of winding up, if winding up was found necessary, and that by virtue of the appointment, the receiver became vested with such title, as was necessary for the performance of his trust.

We submit that it doesn't follow that the right of priority of the state was destroyed by his appointment, and that there is no good reason why the appointment should be held to have had that effect.

Two of the cases cited by appellant in support of its theory of abrogation, viz., the New Jersey case of Board of Middlesex v. Bank, 29 N. J. Eq. 268, and State v. Williams, 101 Md., 529, were cases where receivers had been appointed. In the Michigan case, the state banking department had taken control of a bank. The Wyoming case and the North Carolina case relate to different situations, as will be shown. The Michigan, New Jersey and Maryland cases seem to have been decided upon an assumed analogy between an assignment for the benefit of creditors and the appointment of a receiver, or possession taken by the state banking authorities. In the New Jersey case, the right of priority had been denied, and what is said regarding the question now under consideration seems to have been unnecessary to the decision.

We submit that there is no real analogy; and, further, that the decisions in which it is said that assignments for benefit of creditors will defeat the right of priority must be read and understood in the light of the facts to which they related, and when thus read, will be found to be more limited in their appli-

cation than is assumed by appellant. With regard to such cases, we respectfully submit: That a study of them will lead to the conclusion that a conveyance by a debtor or an assignment by him for the benefit of creditors operates to defeat the priority of the state or sovereign, where the conveyance or assignment created a right of title hostile to or exclusive of the claim of the sovereign. A sale of the property, necessarily, has that effect, for, in a sale the title acquired by the purchaser is intended to be exclusive. An assignment for benefit of creditors generally, the effect of which is to give to the creditors the right to be paid equally and ratably also creates rights hostile to and exclusive of the priority or any preferences. An assignment with preferences, where preferences are allowed by law, would to the same effect. In the one case, the right of all creditors to be paid ratably; in the other case, the creditors to whom lawful preferences were given, would, of course, acquire rights hostile to, and, if valid, exclusive of a claim of priority not expressly protected by law. It is evident these were the kinds of assignments which the courts had in mind when they held or stated that an assignment for benefit of creditors operated to defeat the right of a priority of the sovereign or of the state. But it is easy to suppose a case of an assignment for the benefit of the creditors which would not create any rights hostile to the right of priority, and which, on the contrary, would recognize such right. Let us suppose, for instance, that an assignment to a trustee by an insolvent should expressly provide that the creditors should be paid in the order of priority recognized by law. There would be no sound reason for holding that such an assignment

destroyed the right of priority. The debtor would have parted with his title, it is true, but there would be nothing in the assignment or in the nature of the title acquired by the assignee or in the rights of the general creditors under the assignment that would be antagonistic to the priority. We are quite ready to concede the correctness of the decisions which have dealt with assignments the effect of which was to create rights hostile to the claim of priority, and which, in effect would, necessarily, exclude it. But we submit that it doesn't follow that the courts that have passed upon the effect of such assignments would have denied the right of the sovereign, if the assignment had left the distribution of the assets to be made according to law and according to the priority recognized by law. On the contrary, reason and logic would have required different rulings, to-wit, rulings upholding the priority.

Regarding this point, we submit that there is a controlling consideration in Montana, and by reason of which the decisions relating to the effect of an assignment for benefit of creditors, even if broader than we have just now contended, cannot be held to apply. We have already quoted Section 6142 of the Revised Codes of Montana. By virtue of that section, an assignment for the benefit of creditors is not allowed to destroy or affect any priorities created by law. The effect of that provision must be held to be, to save and preserve the state's priority in spite of the act of the debtor in making the assignment. Any assignment made in Montana is made subject to that provision. It must be interpreted in exactly the same manner as if that provision had been contained in the instrument of assignment. In other words, under any assignment in

Montana, all rights of priority created by law are protected. They must, necessarily, include the state's right of priority. We, therefore, submit that even if the argument from analogy had substantial force, it would have no application here, but, on the contrary, any argument from analogy would, necessarily, lead to a different conclusion from that contended for by appellant.

> "Where the reason of a rule ceases so should the rule itself." Montana Revised Codes, Sec. 6178.

If, therefore, an assignment under the Montana statute cannot defeat the state's right of priority, then, surely the appointment of a receiver should not have that effect. It would, indeed, be a curious result, if the appointment of a receiver made at the instance of the state, in a proceeding brought by the state, in the exercise of its right of supervision over banking corporations, should defeat its own rights. It cannot have been the intention of the statute that such result should follow, else, it would have made an express provision to that effect.

We submit, further, that there is no real analogy between an assignment for benefit of creditors creating rights hostile to the right of preference and the appointment of a receiver.

For what purpose, let us ask, is a receiver appointed in a case like the one in question here? The answer readily suggests itself: For the purpose of the protection of all parties according to their respective interests; for the realization of the assets and the distribution of the proceeds according to law.

If the statute providing for the receivership contained directions regarding the distribution of the property, the statute

would, of course, control, but where there are no statutory provisions, the matter must be deemed to be left to the general rules of law and equity applicable to such cases. In this respect, there is a clear distinction between the effect of such an appointment, and an assignment for benefit of creditors, which either gives special preferences or directs the distribution of property ratably between all creditors. The appointment of a receiver is not in itself hostile to any right of any creditor or to any lien or right of preference. An assignment of the nature supposed, necessarily, is hostile.

It is true that by the appointment of a receiver, the control over the property is taken out of the hands of the debtor, and that creditors thereafter cannot proceed against the property directly, but must apply to the court for relief; but, as we shall show further on, this merely relates to the method of procedure, and the substantial rights of the parties should not be held to be affected thereby. In this case, the officers of the state, as directed by the statute, took steps, the purpose of which was, as pointed out by the court below, the protection of all interested parties, but there is nothing in the statute or in the nature of the proceedings which is hostile to, or exclusive of, the right of priority, and the discharge of the statutory duty imposed upon the officers of the state, as well as of the discharge of his duties by the receiver, is not inconsistent with the rights of the state.

The case of Booth vs. State, 131 Ga. 750, already cited in this brief, is very similar to the case at bar in its essential features and is very instructive. It appears from that case that the statutory provisions of Georgia relating to the deposit of

state moneys in banks and regarding the liquidation of insolvent banks are very similar to ours. There, as here, a receiver had been appointed at the suit of the state. The Attorney General in behalf of the state had instituted the suit for the appointment of the receiver. This would be the same thing, in effect, as a suit by the state, and the state's rights were upheld. In the New York case, In Re Carnegie Trust Company, the bank was in the hands of the state superintendent of banks, who had taken possession and was liquidating under the bank law of the state of New York, by which he was authorized to take possession to collect assets and make distribution. In effect, the condition was similar to those obtaining in the Michigan case. The New York Court of Appeals affirmed the judgment of the appellate division of the Supreme Court, and upheld the right of the state. Appellant attempts to distinguish this case by saying that the superintendent of banks had no title; but if the bank was insolvent and he was the liquidating officer with power to dispose of the property, he surely had as much title as a receiver would have, and as much as similar officers in Michigan. We quote the New York statute as it then existed, in the appendix to this brief.

As pointed out by the court below, the bank in this case had not been dissolved. The statute does not require its dissolution as a condition of the appointment of the receiver. As to whether its dissolution would eventually follow, as a matter of course or necessity, we do not inquire. It is familiar knowledge that in similar cases, banks have been rescued from insolvency either through arrangement with creditors or by stockholders putting up the deficiency. Whatever the right or

title of the receiver may be, it comes to him through the law. It is at best of a qualified nature. All of these considerations go to show that the appointment of the receiver and his title, such as it is, are not adverse or hostile to the rights of creditors.

As a sub-division of his third proposition, the appellant also contends that by the appointment of the receiver, the bank lost control over the property, and the same was put beyond the reach of any creditor. Assuming that to be true, it does not follow that the state lost its right thereby. It is quite true, as already admitted, that the property is placed beyond the reach of the creditor, if by that is meant individual or direct action on the part of a creditor against the property itself. It is, of course, familiar law that the creditor cannot attach or levy upon property in the custody or under the control of the court, but it isn't beyond his reach in the sense that his claims or his substantial rights are impaired. Instead of having to sue or attach, the creditor applies to the court, and the court, in the distribution of the assets, protects his rights. In this connection, we quote from the Supreme Court of the United States in Ex Parte Tyler, 149 U. S. 164 (a case where a sheriff had attempted to levy on property in the possession of a receiver), the following pertinent passage:

> "It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets, a right which it could have enforced through its revenue officers by the summary process of distress, but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the adminis-

The passage is quoted by U.S.Supreme Court from decision by Supreme Court of Missouri in 98 Mo. 458, referred to by U.S. Supreme Court. In connection therewith see also

> tration and distribution of those assets to respect that paramount right, upon the, untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets *in custodia legis* except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance within a given time."

If the State, from motives of public policy, ought to be accorded a priority for taxes due it which have never been paid, it ought, for the same reason, to have a priority in respect to these funds which, of course, arose in all probability from taxes which had been paid to it, and which had simply been deposited in the bank to await the time when the State should have occasion to devote them to the uses for which they were collected. The mind readily admits the priority of any claim of the State for the payment of taxes due it, but priority as to other claims is not so generally accorded. It must be admitted that no ground for any distinction in this regard can exist, as pointed out in the opinion in the *Carnegie Trust Company* case.

The case of State v. Foster (Wyo.) in its reference to assignments simply stated general principles. It was not called upon to decide the effect of assignments for the benefit of creditors or receiverships. The question for decision there was

Constitution of Montana, Article 5, Sec. 39.

tration and distribution of those assets to respect that paramount right, upon the, untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets *in custodia legis* except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance within a given time."

If the State, from motives of public policy, ought to be accorded a priority for taxes due it which have never been paid, it ought, for the same reason, to have a priority in respect to these funds which, of course, arose in all probability from taxes which had been paid to it, and which had simply been deposited in the bank to await the time when the State should have occasion to devote them to the uses for which they were collected. The mind readily admits the priority of any claim of the State for the payment of taxes due it, but priority [illegible] regard can exist, as pointed out in the opinion in the *Carnegie Trust Company* case.

The case of State v. Foster (Wyo.) in its reference to assignments simply stated general principles. It was not called upon to decide the effect of assignments for the benefit of creditors or receiverships. The question for decision there was

a different one. The North Carolina case of Hoke v. Henderson had to do with an actual sale.

IV.

THE STATE HAS NOT FAILED TO EXERCISE ITS RIGHT, AND THE APPELLEE IS ENTITLED TO SUBROGATION.

How can it be said that the state has failed to exercise its right, and under what principles of law can laches be imputed to the State? Who was the officer competent, either to waive the rights of the state, or by his inaction, to impair the state's rights?

It is, of course, familiar law that laches cannot be imputed to the state, and that no official, unless he be given, by the constitution or the statute, some express power so to do, can waive any right of the state, or, by his neglect of duty, impair the state's rights. The quotation just made from the United States Supreme Court in Ex Parte Tyler is sufficient answer to this contention.

See also

A. & E. Encyc. of Law Vol. 26, pp. 479-480.

Moreover, under the express provisions of the Montana Codes the appellee is entitled to subrogation.

Revised Codes of 1907:

> Section 5691. "THE SURETY ACQUIRES THE RIGHT OF THE CREDITOR.—A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to

contribute thereto, without regard to the order of time in which they became such."

Section 5692. "SURETY ENTITLED TO BENEFIT OF SECURITIES HELD BY CREDITOR.—A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."

There would seem no reason why the surety, paying the debt to the state should not, under the general rules of subrogation, succeed to all of the rights of the state, in the enforcement of its claim. If the state had taken securities to insure the payment of any debt to it, the surety would be entitled to the benefit of those securities.

It is impossible to admit the application of the doctrine of subrogation in the case of securities taken by the state and deny it in respect to the priority enjoyed by the state in consequence of its sovereignty. The debtor to the state can secure a surety for his obligations thereto, much more readily than can the private individual. The risk to the surety is not so great. The surety will reason with himself that inasmuch as the State has a preference in the distribution of the assets, it is altogether likely that he will not be called upon to pay,—that is to say, that the State will first exhaust the assets of the debtor before calling upon the surety. It is, accordingly, only just that if the State should choose to proceed against the surety first, he should have the same right to be paid in preference out of the assets of the debtor.

The right of subrogation is upheld in:

Orem v. Wrightson, 51 Mr. 34; 34 Am. Rep. 286.

This case has been cited as authority in many cases in various states, as will be seen by the note in Vol. 17 of Notes on American Reports, page 785.

See also

Hart v. Tienan, 59 Conn. 521; 21 Atl. 1007.
American Bonding Co. v. Mechanics' Bank, 97 Md. 598; 55 Atl. 395; 99 Am. St. Rep. 466.

And see note to the above named case, on pages 497 ea seq.

V.

The receiver's certificate of proof of claim (Tr. p. 8), certifying that the state treasurer had made proof "that he is a general creditor of the First Trust and Savings Bank of Billings, Mont., etc.," does not detract from the complainant's rights. Such a certificate could not, of course, detract from the rights of the state. It was not for the receiver to determine what the claim of the state was, whether it was a preferred claim, or merely a claim of a general creditor. That could only be judicially determined. The certificate was issued to the official "as treasurer of the State of Montana." It was, therefore, a certificate issued for the benefit of the state. Its acceptance by the state treasurer could not amount to a waiver of the rights of the state.

The foregoing is merely the application of familiar prinicples of law, to the case in hand.

VI.

Appellant, as its last point, questions the sufficiency of the authorization granted by the state court to the plaintiff to sue the receiver, in so far as it applies to a suit brought in the fed-

eral court. This point is now presented for the first time. We take it that it will not be seriously pressed. The answer admits that said complainant was authorized to bring action against said receiver as alleged in the bill of complaint (Tr. pp. 16-17). No objection was raised by answer or otherwise, to the sufficiency of the order to authorize the bringing of the suit in the federal court. Upon the allegations of the complaint and answer, it must be taken that the order was sufficient to authorize the bringing of an action in any court of competent jurisdiction. The case cited by appellant, viz, Porter v. Saben, 149 U. S. 473, is not at all in point. That case held that a receiver could not be sued without the consent of the court which had appointed him. It appeared in the complaint in that case that application had been made to the state court for leave to sue, and that leave had been refused. The proper objection was raised by demurrer, and the court held the case should be dismissed for lack of authority to bring suit. Evidently, the case has no relevancy to the point sought to be made by appellant. Here the complainant has obtained leave.

Respectfully submitted,

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Solicitors for Appellee.

APPENDIX.

(Law of Montana relative to the deposit of state funds in Banks.)

"183. DESIGNATION OF STATE DEPOSITORIES. REGULATION OF DEPOSITORIES. —The State Treasurer shall designate as depositories, as many banks within the state as in his judgment are necessary for the safe keeping of the public moneys in his hands as hereinafter directed; provided that all banks by him designated as depositories shall undertake and agree, as a condition precedent to the depositing of any funds with them for safe keeping, that interest shall be paid upon the daily balances of all such deposits at the rate of two and a half per cent per annum, and all deposits shall be adequately and properly secured to the Treasurer as herein specified. No deposits shall be made of state funds by the State Treasurer until he shall first have received as security therefor, in amount at least equivalent to the amount of such deposit, bonds of the United States, or of the State of Montana, or county, school district, or municipal bonds issued in this state, or such other good and sufficient security as shall have been first approved by the State Board of Examiners. All such deposits shall be subject to withdrawal by the said treasurer in such amounts as may be necessary, from time to time, to pay and discharge the legal obligations of the state duly presented to him in accordance with the law. No deposit of said funds shall be made or permitted to remain in any bank unless the treasurer shall have first designated such bank as a depository, nor until the security for the deposit shall first have been deposited with the treasurer and have been approved by the State Board of Examiners. In designating the depositories for state funds, the State Treasurer shall, as near as may be found practicable, make designation of depositories in the respective counties of the state, and cause to be deposited in them public funds proportionate to the amount of public revenue received from such counties by the state. All interest paid and collected on deposits shall be, by the treasurer, credited and belong to the particular fund to which belong the moneys deposited and on which interest is paid. The treasurer shall have the power to direct the withdrawal of all such moneys

from any bank for any reason. Nothing herein contained shall be construed as limiting or impairing the right of the State Board of Land Commissioners to invest public moneys in bonds or other securities as otherwise provided for by law." (Act approved March 7th, 1907, § 1.)

(Laws of New York. Chapter Two of Conscolidated Laws as enacted by Chapter Ten of the Laws of 1909.)

Section 19. "PROCEEDINGS AGAINST AND LIQUIDATION OF DELINQUENT CORPORATIONS AND INDIVIDAUL BANKERS. Whenever it shall appear to the superintendent that any corporation or individual banker to which this chapter is applicable has violated its charter or any law of the state, or is conducting its business in an unsafe or unauthorized manner, or if the capital of any such corporation or individual banker is impaired, or if any such corporation or individual banker shall refuse to submit its books, papers and concerns to the inspection of any examiner, * * *, the superintendent may forthwith take possession of the property and business of such corporation or individual banker, and retain such possession until such corporation or individual banker shall resume business, or its affairs be finally liquidated as herein provided. On taking possession of the property and business of any such corporation or individual banker the superintendent shall forthwith give notice of such fact to any and all banks, trust companies, * * *. Upon taking possession of the property and business of such corporation or individual banker the superintendent is authorized to collect moneys due to such corporation or individual banker, and do such other acts are are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. The superintendent shall collect all debts due and claims belonging to it, and upon the order of the supreme court may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such corporation or individual banker on such terms as the court shall direct; and may, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders. * * *. The superintendent shall cause notice to be given

by advertisement, in such newspapers as he may direct, weekly for three consecutive months, calling on all persons who may have claims against such corporation or individual banker to present the same to the superintendent, and make legal proof thereof at a place and within a time, not earlier than the last day of publication, to be therein specified. The superintendent shall mail a similar notice to all persons whose names appear as creditors upon the books of the corporation or individual banker. If the superintendent doubts the justice and validity of any claim, he may reject the same, and serve notice of such rejection upon the claimant either by mail or personally. * * * At any time after the expiration of the date fixed for the presentation of claims the superintendent may out of the funds remaining in his hands after the payment of expense declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors he may declare a final dividend, such dividends to be paid to such persons, and in such amounts, and upon such notice, as may be directed by the supreme court in the judicial district in which the principal office of such corporation or individual banker is located."

(The section is very long. It is believed that the above excerpts comprise what is material to the discussion.)